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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JUDITH SCHMERTZ and BARBARA JOSEPHER,

Petitioners,

v.

NASSAU COUNTY BOARD OF SUPERVISORS, THOMAS GULOTTA, as Presiding Supervisor of Town of Hempstead, JAMES BENNETT, as Supervisor of Town of Hempstead, JOHN KIERNAN, as Supervisor of Town of North Hempstead, HANNAH KOMANOFF, as Supervisor of City of Long Beach, JOSEPH COLBY, as Supervisor of the Town of Oyster Bay, and VINCENT A. SUOZZI, as Mayor-Supervisor of City of Glen Cove,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Dated: October 23, 1984

8 Opp

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QUESTION PRESENTED

Whether the Court of Appeals for the Second Circuit erred in affirming, because it believed that it was bound by *Franklin v. Krause*, 415 U.S. 904 (1974), the District Court's granting of Respondents' motion for summary judgment, which approved a Banzhaf weighted voting plan for Nassau County, New York with a 132% total deviation from equal weight, contrary to *Abate v. Mundt*, 403 U.S. 182 (1971).

PARTIES TO THE PROCEEDINGS

Petitioners Judith Schmertz and Barbara Josepher respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on May 22, 1984, and that the Court summarily dispose of this petition on the merits by reversing the judgment below. *See* Sup. Ct. Rule 23.1.

The Respondents are identical to the Appellees below, except that Vincent A. Suozzi, as the successor to Alan Parente, Mayor-Supervisor of the City of Glen Cove, is automatically substituted pursuant to Sup. Ct. Rule 40.3. The Appellants below also included The League of Women Voters of Nassau County, Carol Carlton, Adele Fox, and Ann Borner, who were held not to have standing by the court below.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 737 F.2d 155 (2d Cir. 1984), is reproduced as Appendix A. The unreported opinion of the District Court for the Eastern District of New York is reproduced as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on May 22, 1984. A timely petition for rehearing *en banc* was denied by order filed July 26, 1984, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV, sec. 1 provides in relevant part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 (1976) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Nassau County Government Law § 104(1)-(4) (1975) and Nassau County Local Law No. 2-1982 (March 8, 1982) are attached as Appendices C and D, respectively.

STATEMENT OF THE CASE

The legislative body of Nassau County, a county with a population of more than 1.3 million, is a Board of Supervisors composed *ex officio* of the elected Supervisors of the County's five municipalities. Hempstead, the largest municipality, has its two Supervisors on the Board. Each of the six Supervisors is allocated a number of votes in accordance with the Banzhaf weighted voting method.[1] This method is intended to allow municipalities of different population sizes to be represented as municipalities on the County Board while meeting the constitutional requirement that representation be proportionate to population.

In a Banzhaf weighted voting system, the number of votes allocated to each municipality gives each municipality "voting power" which deviates as little as possible from that municipality's percentage of total population. The voting power of a municipality is the probability that its vote will be decisive, assuming that all vote combinations are equally likely. *See* Johnson, *An Analysis of Weighted Voting as Used in Reapportionment of County Governments in New York State*, 34 Albany L. Rev. 1, 11-15 (1969); *see also* Banzhaf, *Weighted Voting Doesn't Work*, 19 Rutgers L. Rev. 317, 322-4 (1965). Thus, in a Banzhaf system, the number of votes allotted to each municipality need not be directly proportional to that municipality's population share, but the voting power of each municipality should be directly proportional to that municipality's population share.

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[1] This method of allocating votes in a weighted voting system takes its name from Professor John F. Banzhaf, III. *See* Banzhaf, *Weighted Voting Doesn't Work*, 19 Rutgers L. Rev. 317 (1965). In *Iannucci v. Board* of Supervisors, 20 N.Y.2d 244, 249, 229 N.E.2d 195, 197, 282 N.Y.S.2d 502, 506 (1967), the New York Court of Appeals, citing "the 'one person, one vote' principle announced in *Reynolds v. Sims*, 377 U.S. 533," endorsed the Banzhaf method for the legislative bodies of political subdivisions of New York that use weighted voting.

The instant case was brought after Nassau County Local Law No. 2-1982 reallocated the number of votes among the members of the County Board of Supervisors following the 1980 census. The votes of the Supervisors under the challenged plan and the populations of their municipalities are summarized in the following table, adapted from the opinion below. *See* 737 F.2d at 159 (Appendix A at A-11):

Supervisor	Population	% Pop.	No. of Votes	% Voting Power
Hempstead	738,517	55.92 %	58	53.85 %
Oyster Bay	305,750	23.12	22	21.15
North Hempstead	218,624	16.53	15	17.31
Long Beach	34,073	2.58	7	5.77
Glen Cove	24,618	1.86	6	1.92
	1,321,582	100.01 %	108	100.00 %.

The Presiding Supervisor of Hempstead has 30 and the second Hempstead Supervisor has 28 of Hempstead's 58 votes. Nassau County Local Law 2-1982 (March 8, 1982), (Appendix D at D-2). Sixty-five votes are required for a majority. *Id.*

As the table above indicates, the City of Long Beach is the most over-represented municipality. It has 2.58 % of the population of the County and 5.77 % of the total voting power on the County Board. The town of Oyster Bay is the most under-represented municipality. It has 23.12 % of the population of the County, but only 21.15 % of the voting power on the County Board of Supervisors.

Plaintiffs challenged, among other aspects of the Nassau County plan, the size of the deviations from the one person, one vote standard, contending that these deviations, lawfully measured, totalled not 7.3 %, as Defendants said, but 132.16 %. The basis for federal jurisdiction in the District Court for the Eastern District of New York was 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3). The District Court granted Defendants' motion for summary judgment and dismissed the complaint. This

decision was affirmed in an opinion by Eastern District Judge Neaher, sitting by designation on the Court of Appeals for the Second Circuit. 737 F.2d 155 (2d Cir. 1984) (Appendix A). The Second Circuit held that this case is controlled by *Franklin v. Krause*, 32 N.Y.2d 234, 298 N.E. 2d 68, 344 N.Y.S.2d 855 (1973), *appeal dismissed for want of a substantial federal question*, 415 U.S. 904 (1974). In *Franklin v. Krause*, the plaintiffs had challenged the constitutionality of an earlier Banzhaf weighted voting system for Nassau County based on the 1970 census. This Court dismissed summarily for want of a substantial federal question an appeal from a decision of the New York Court of Appeals upholding the weighted voting plan.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE REAPPORTIONMENT DECISIONS OF THIS COURT

The decisions below and in *Franklin v. Krause*, 415 U.S. 904 (1974), are in conflict with *Abate v. Mundt*, 403 U.S. 182 (1971). Since *Abate*, this Court has consistently used the Abate test as the starting point in its examination of the constitutionality of reapportionment schemes. *See, e.g., Brown v. Thomson*, 103 S. Ct. 2690 (1983); *Karcher v. Daggett*, 103 S. Ct. 2653 (1983); *Connor v. Finch*, 431 U.S. 407 (1977); *White v. Weiser*, 412 U.S. 783 (1973); *White v. Regester*, 412 U.S. 755 (1973); *Gaffney v. Cummings*, 412 U.S. 735 (1973); *Mahan v. Howell*, 410 U.S. 315 (1973).

The *Abate* test first measures each district's deviations from the one person, one vote standard as a percentage of the ideal size or the ideal amount of representation for that district in a reapportionment plan:

$$\% \text{ deviation} = 100 \times \frac{\text{actual} - \text{ideal}}{\text{ideal}}.$$

The total deviation for a plan is the sum of the absolute values of the largest positive and negative deviations of individual districts. *See Abate v. Mundt*, 403 U.S. at 184.

This test applies to all voting systems, be they single-member district systems, multi-member district systems, or Banzhaf weighted voting systems. *See, e.g., Brown v. Thomson*, 103 S. Ct. 2690 (1983) (applying test to single-member district scheme of Wyoming House of Representatives); *Karcher v. Daggett*, 103 S. Ct. 2653 (1983) (applying test to New Jersey congressional districting); *White v. Regester*, 412 U.S. 755, 761-64 (1973) (applying test to Texas House of Representatives scheme including single-member and multi-member districts); *Abate v. Mundt*, 403 U.S. 182, 184-85 (1971) (applying test to multi-member district system of Rockland County, N.Y.); *Whitcomb v. Chavis*, 403 U.S. 124, 161-62 (1971) (applying test to reapportionment plan of Indiana legislature including single-member and multi-member districts); *Morris v. Board of Estimate*, No. 81 CV 3920 (E.D.N.Y. Aug. 21, 1984) (Neaher, J.) (applying test to New York City Board of Estimate, a body with three at-large members having two votes each, and five members, each representing one borough, with one vote each), *on remand from* 707 F.2d 686 (2d Cir. 1983); *Andrews v. Koch*, 528 F. Supp. 246 (E.D.N.Y. 1981),*aff'd without op.*, 688 F.2d 815 (2d Cir. 1982), *aff'd sub. nom. Giacobbe v. Andrews*, 459 U.S. 801 (1982), (Neaher, J.) (applying test to New York City Council, containing single-member districts and two at-large seats for each of the five boroughs), *aff'd*, 688 F.2d 815 (2d Cir. 1982), *aff'd*, 459 U.S. 801 (1982); *English v. Lefever*, 94 A.D.2d 755, 462 N.Y.S.2d 695 (1983) (applying *Abate* test to Banzhaf weighted voting plan for Rockland County, New York).

In the case of a Banzhaf system for a county board, the "actual" representation of a given municipality is its percentage of the total voting power on the board. Its "ideal" representation corresponds to its share of the county's population. Applying *Abate* to a Banzhaf system, the formula for computing percentage deviations is:

$$\% \text{ deviation} = 100 \times \frac{\%\text{ of total voting power} - \%\text{ of total population}}{\%\text{ of total population}} .$$

See Grofman & Scarrow, *Weighted Voting in New York*, 6 Legis. Stud. Q. 288, 297 (1981); Johnson, *supra* p. 3, at 21-27 (1969); Papayanopoulos, *Computerized Weighted Voting Reapportionment*, in 50 Am. Federation of Information Processing Societies, National Computer Conference Proceedings 623 (1981).

The table below shows the *Abate* calculations for the Nassau County Board of Supervisors' voting scheme:

Municipality	% Voting Power	% Total Population	Absolute Difference	% Deviation
Hempstead	53.85 %	55.92 %	-2.07	-3.70 %
Oyster Bay	21.15	23.12	-1.97	-8.52
North Hempstead	17.31	16.53	+0.78	+4.71
Long Beach	5.77	2.58	+3.19	+123.64
Glen Cove	1.92	1.86	+0.06	+0.03.

The column headed "Absolute Difference" is the difference between " % Voting Power" and " % Total Population," *i.e.*, the numerator in the formula set out above. The column headed " % Deviation" is obtained for each municipality by dividing the "Absolute Difference" by the denominator in the formula set out above, *i.e.*, " % Total Population."

The formula used by Nassau County to justify its plan, and approved by the decisions below, is simply the arithmetic difference between " % Voting Power" and " % Total Population," *i.e.*, the numerator of the correct formula. Thus, the figures Appellees below presented as "deviations" are only Absolute Differences.

Absolute Differences are not useful standards for comparison because the same Absolute Difference is equivalent to vastly different deviations for municipalities with different populations. In order to obtain deviations that can be compared to one another and to the deviations used by this Court in deciding *Abate* and subsequent reapportionment cases, the Absolute Difference for each municipality must be divided by that municipality's " % Total Population."

For example, for the City of Long Beach, the Absolute Difference between its 2.58 % of the County's population and its 5.77 % of the total voting power on the Board of Supervisors is 3.19 percentage points. This is the figure presented by the courts below as the "deviation" for Long Beach. The correct deviation, however, is 123.64 % (3.19/2.58 = 1.2364 = 123.64 %). The same Absolute Difference of 3.19 percentage points would represent a far smaller deviation in the case of Hempstead, which comprises 55.92 % of the County's population: It would be a deviation of only 5.71 % (3.19/55.92 = .0571 = 5.71 %).

The result of using Absolute Differences instead of correctly calculated deviations is to understate dramatically the total deviation in the Nassau County plan. According to the Court of Appeals, which used the figures of Appellees below, the total "deviation" is "5.26 % (the Town of Hempstead's -2.07 % computed with Long Beach's + 3.19 %). . . ." 737 F.2d at 160 (Appendix A at A-11). However, the total deviation, computed according to *Abate*, is 132.16 % (the Town of Oyster Bay's -8.52 % computed with Long Beach's + 123.64 %).

Petitioners believe that Nassau County is the only New York State county to use the Absolute Difference measure used by the New York courts in *Franklin v. Krause* instead of the correct percentage deviation measure required by *Abate v. Mundt*.[2] The correct formula for measuring deviations in Banzhaf weighted voting systems has been used in at least the eighteen New York counties listed in Table I. *See infra* p. 20.

The correct formula has been repeatedly applied by courts in the State of New York, both before and after *Franklin v. Krause*, as the cases cited in Table I show. For example, the

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[2] Johnson, *supra* p. 3, at n. 96, suggests that the court in *Kattrein v. Board of Supervisors of the County of Hamilton*, No. 2646 (N.Y. Sup. Ct. Hamilton County Jan. 6, 1969), may have relied on what we have called an Absolute Difference. An examination of the opinion in this case shows that the court had before it both the Absolute Difference measures and the percentage deviation measures, but it relied solely on the latter.

court in *English v. Lefever*, 94 A.D.2d 755, 462 N.Y.S.2d 695 (1983), properly struck down the reapportionment plan of Rockland County — the same county involved in *Abate v. Mundt* — because the plan had a deviation of 37.15 %. This plan would not have been struck down had the court used the measure used by the New York courts in *Franklin v. Krause* and in the court below. The Rockland county plan would have appeared to have a deviation of only 2.03 %.[3] See also Grofman & Scarrow, *supra* p. 7, at 298, for examples of other systems that were declared unconstitutional under the correct test before *Franklin v. Krause*, but would have been approved by a court applying the measure employed by the New York courts in *Franklin v. Krause*.

Recently, Judge Neaher himself correctly applied the *Abate* test in two cases challenging the constitutionality of the City Council and the Board of Estimate of New York City. *Morris v. Board of Estimate*, No. 81 CV 3920, slip op. at 7 (E.D.N.Y. Aug. 21, 1984); *Andrews v. Koch*, 528 F. Supp. 246 (E.D.N.Y. 1981), *aff'd*, 688 F.2d 815 (2d Cir. 1982, *aff'd*, *sub nom. Giacobbe v. Andrews*, 459 U.S. 801 (1982).

Moreover, Professor Lee Papayanopoulos, the expert of Appellees below, has presented precisely the formula set forth in this petition as the correct way to apply the *Abate* test to measure deviations in constructing a Banzhaf weighted voting system. Papayanopoulos, *supra* p. 7, at 626. Professor Papayanopoulos has analyzed weighted voting plans for a number of New York counties. *See infra* Table I. In every instance that has come to Petitioners' attention, with the sole exception of Nassau County, he has used the correct formula as set forth in this petition.

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[3] *See* Appendix E for Professor Papayanopoulos's correct analysis of the Rockland County plan. The total deviation (*i.e.*, "discrepancy" — see column H) is obtained by summing the largest positive and the largest negative deviations: 19.79 % + 17.36 % = 37.15 %. In contrast, according to *Franklin v. Krause*, the largest Absolute Differences are: 4.68 % — 3.87 % = .81" %", and 7.37 % — 6.15 % = 1.22" %", and the total "deviation" is: .81" %" + 1.22" %" = 2.03" %". The percent signs following the Absolute Difference figures appear in quotation marks because these figures are not themselves percentages. They are, instead, computed by subtracting two numbers, each of which is a percentage. Since the two numbers are not percentages of the same quantity, however, it is incorrect to express the result of the subtraction as a percentage.

When one compares the computer analyses presented to the trial courts in *Franklin v. Krause* and in this case with analyses prepared by the same expert for other counties, it is clear that a different measure of deviation was used for Naussau County. In the tables produced by Professor Papayanopoulos' computer analyses for counties other than Nassau, there are eight columns, generally labelled as follows: A: TOWN; B: POPULATION; C: VOTE; D: # DECISIVE COMBINATIONS; E: % VOTE; F: VOTING POWER; G: % POPULATION; H: DISCREPANCY. The last column, labelled "H: DISCREPANCY," corresponds to the deviation for each district computed according to the correct formula. This is true even of Professor Papayanopoulos' analyses prepared after *Franklin v. Krause* was decided. *See infra* Table I; Appendix E (reproducing table for Rockland County); Papayanopoulos, *supra* p.7 (presenting analyses for Oswego, Putnam and Schoharie counties); *see also supra* note 3.

While the tables presented as exhibits to the trial court in *Franklin v. Krause*, prepared by Professor Papayanopoulos, are identical in other respects to those described above, they contain only seven columns. *See* Appendix F* (reproducing Exhibit D annexed to Affidavit of George C. Pratt in Support of Cross-Motion and in Opposition to Plaintiffs' Motion). These tables are missing the eighth column, labelled "DISCREPANCY," and thus do not include any measure of deviation. The New York courts used what we have called the Absolute Difference as the measure of deviation.

In the instant case, the tables presented by Nassau County, labelled "*Special* Weighted Voting Analysis" (emphasis added), have eight columns, and refer to their computations as being made in accordance with *Franklin v. Krause*, a reference not present in the table for Rockland County. *Compare* Appendix G *with* Appendix E. The labels of the first seven columns of the Nassau County tables are the same as columns A through

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*The Clerk of this Court has informed Petitioners' counsel that we may refer to the record of a case that was acted upon by this Court regardless of whether or not that record is still at this Court and that insofar as R. Stern and E. Gressman, Supreme Court Practice 687-88 (5th ed. 1978), suggests the contrary, it is out of date.

G for other counties and *Franklin v. Krause*, but the eighth column has no letter label, and is marked "ABSOLUTE DEVIATION," not "DISCREPANCY." This column corresponds to what we have called the Absolute Difference, *i.e.*, the numerator in the correct formula.

Except for citations to *Franklin v. Krause*, neither the courts below nor the Appellees below explained why the constitutionality of Nassau County's Banzhaf weighted voting plan should be measured by a different test than that used by other counties employing the same type of weighted voting system. In fact, the courts below do not even seem to perceive that the method employed in Nassau County is different from that employed elsewhere.

When one applies the correct measure of deviation to the challenged Nassau County plan, the total deviation is more than 130 %, far in excess of constitutional limits. This Court has stated that, in evaluating the compliance of an apportionment plan with the constitutional one-person, one-vote mandate:

> an apportionment plan with a maximum population deviation under 10 % falls within [the] category of minor deviations. A plan with larger disparities in population, however, creates a prima facie case of discrimination. . . . The ultimate inquiry, therefore, is whether the legislature's plan 'may reasonably be said to advance [a] rational state policy' and, if so, 'whether the population disparities among the districts that have resulted from the pursuit of this plan exceed constitutional limits.'

Brown v. Thomson, 103 S.Ct. at 2696 (quoting *Mahan v. Howell*, 410 U.S. 315, 328 (1973) (citations omitted)). Thus, this Court's "ultimate inquiry" focuses on a jurisdiction's justifications for deviations from the one person, one vote standard.

In *Brown v. Thomson*, 103 S.Ct. 2690 (1983), this Court approved the representation as a unit of a county whose population deviated by 60 % from average district population. The total

deviation in that plan was 89 %. But because plaintiffs had only challenged the representation accorded to one county, the Court explicitly refrained from examining the entire plan, noting that the state had a strong interest in maintaining the integrity of political subdivisions. In a concurring opinion joined by Justice Stevens, Justice O'Connor, after discussing the special procedural posture of the case, stated that she had "the gravest doubts that a statewide legislative plan with an 89 % maximum deviation could survive constitutional scrutiny despite the presence of the State's strong interest in preserving county boundaries," and continued, "I join the Court's opinion on the understanding that nothing in it suggests that this Court would uphold such a scheme." *Id.* at 2700.

In contrast to *Brown*, the entire Nassau County plan was before the courts below and is before this Court. The largest individual deviation is more than double that approved in *Brown v. Thomson*, and the total deviation is more than 40 % greater than the 89 % deviation which the concurring justices said raised "the gravest doubts" about the constitutionality of the entire plan. *Id.*

The record in this summary judgment case contains no justification for such gross deviations from the constitutional standard. Appellees below asserted that "the present apportionment of weighted votes among the defendant BOARD distributes its 'voting power' *as close as is mathematically possible* to the percentage of population each Supervisor represents." Brief for Appellees below at 36-37, *League of Women Voters v. Nassau County Board of Supervisors*, 737 F.2d 155 (2d Cir. 1984) (emphasis in original). Even if true, this is not a justification of the plan. At most, it is a statement that a Banzhaf weighted voting system is incapable of assigning weights that comply with constitutional limits in Nassau County because the population disparities between the municipalities of Nassau County are too great: the population of Hempstead is 29.9 times that of Glen Cove. *See supra* p. 4; Johnson, *supra* p. 3, at 22-27 (discussing the effect of population disparities on a Banzhaf weighted voting system). Nassau County, either unable or unwilling to bring its scheme into compliance with the constitutional standard, seeks to alter that standard to comport with its scheme.

II. THE QUESTION PRESENTED IS IMPORTANT

The error of the courts below, if not corrected by this Court, will lead to inconsistent and unconstitutional apportionments throughout the State of New York.

According to a study published in 1981, 24 counties in New York State, out of 57 counties outside of New York City, had weighted voting systems. Grofman & Scarrow, *supra* p. 7, at 288. Cayuga County has recently shifted from a single-member district system to a Banzhaf weighted voting system. *See* Cayuga Local Law 3-1982 (Mar. 16, 1982). Rockland County sought to adopt a Banzhaf system in 1981. *See English v. Lefever*, 94 A.D.2d 755, 462 N.Y.S.2d 695 (1983).

The malapportionment of Nassau, the largest county in New York State outside of New York City, is in itself important.

New York City's Board of Estimate has a kind of weighted voting system, although not a Banzhaf system. If, as appears probable, *see Morris v. Board of Estimate*, No. 81 CV 3920 (E.D.N.Y. Aug. 21, 1984) (Neaher, J.), *on remand from* 707 F.2d 686 (2d Cir. 1983), the Board of Estimate as now constituted does not pass constitutional muster, a Banzhaf system may be adopted to weight the votes of each borough president in proportion to the population of that borough. The population of Brooklyn, the largest borough, is more than six times that of Staten Island, the smallest borough. *Id.* at 5. Under the decision below, if not reversed, a Banzhaf or other weighted voting system could be adopted for the Board of Estimate that seriously over- or under-represented the smaller boroughs.

The instant case demonstrates the difficulty, and perhaps the impossibility, of constructing a constitutional weighted voting system where population disparities between districts are great. This Court should make clear that when such difficulties are present, the weighted voting system, not the constitutional standard, should give way.

This Court has frequently expressed misgivings about multi-member districts. *See, e.g., Connor v. Finch*, 431 U.S. 407, 415

(1977); *Chapman v. Meier*, 420 U.S. 1, 15-20 (1975) (citing Banzhaf, *Multi-Member Electoral Districts – Do They Violate the "One Man, One Vote" Principle*, 75 Yale L.J. 1309 (1966)); *Whitcomb v. Chavis*, 403 U.S. 124, 142-48, 157-160 (1971) (same); *id.* at 168-71 (Harlan, J. separate opinion) (same). Weighted voting systems are functionally very similar to multi-member district systems.[5] Every problem of the multi-member district system is compounded in a weighted voting system. *See generally* Grofman & Scarrow, *supra* p. 7; Scarrow, Parties, Elections, and Representation in the State of New York 118-28 (1983). Whether the Banzhaf method is used or not, problems remain. For example, such systems may often work to exclude racial and political minorities from the political process, thereby violating Section 2 of the Voting Rights Act, 42 U.S.C. 1973 (1976 & Supp. V 1982), and possibly the Equal Protection Clause of the Fourteenth Amendment.[6]

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[5] *See* Grofman & Scarrow, supra p. 7, at 299. Multi-member district systems and weighted voting systems are similar in that they give multiple votes to districts, the number of votes being proportionate (directly or indirectly through voting power) to district size. The difference between them is that in the former type of system the votes of each district are allocated to a number of representatives, each representative having one vote, whereas in the latter type of system a single representative casts all the votes of the district.

[6] A major problem of multi-member district systems is that the members elected at large from one district tend to be elected on a slate. These systems therefore tend to submerge minorities and to overrepresent the winning party. *See Connor v. Finch*, 431 U.S. 407, 415 (1977); *Whitcomb v. Chavis*, 403 U.S. 124, 158-159 (1971). Unless the voters split their tickets, all the representatives of the district will be from the same party. In a weighted voting scheme, the district elects only one representative, and the majoritarian bias is all the greater. *See, e.g.*, H. Scarrow, Parties, Elections, and Representation in the State of New York 119 & Table I (1983).

The possibility of the exclusion of minorities is very serious in the case of Nassau County, because the computation of the voting power scores does not take into account the fact that the two representatives of Hempstead on the Board are very likely to vote as a bloc. In computing the voting power of Hempstead, Nassau County Government Law 104(4)(f) requires the voting power scores of the two Hempstead members to be added, as though they were completely independent. Grofman and Scarrow, *supra* p. 7, at 296, use

Footnote Continued

Obviously, single-member districts are the preferred means of implementing the ideal of one person, one vote. *See, e.g., Connor v. Finch*, 431 U.S. at 415 (noting disadvantages of multi-member districts and stating that "this Court has concluded that single-member districts are to be preferred in court-ordered legislative apportionment plans"); *East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636, 639 (1976) (per curiam) (same); *Chapman v. Meier*, 420 U.S. 1, 14-21 (same); *Connor v. Johnson*, 402 U.S. 690, 692 (1971) ("When district courts are forced to fashion apportionment plans, single-member districts are preferable to large multi-member districts as a general matter.").

This Court has recognized that local governments need "flexibility ... if they are to meet changing societal needs." *Abate v. Mundt*, 403 U.S. at 185; *See also Sailors v. Board of Education*, 387 U.S. 105, 110-11 (1967). But given the problems inherent in weighted voting systems, local governments must be required to implement them correctly if they are to be used instead of single-member districts. If weighted voting systems are not implemented correctly, they should be declared unconstitutional.

III. THE QUESTION PRESENTED IS NOT GOVERNED BY THIS COURT'S SUMMARY DISPOSITION OF *FRANKLIN V. KRAUSE*

The Second Circuit's opinion is based upon that court's belief that "this case is controlled by the Supreme Court's earlier decision in *Franklin v. Krause*." 737 F.2d at 156 (Appendix A at A-3) (citations omitted). Petitioners agree with Judge Neaher's statement of the precedential value of a summary disposition

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Footnote Continued From Previous Page

the example of an earlier Nassau County scheme in which each Hempstead Supervisor had 27.8 % of the voting power and the town as a whole was said to have 55.6 % of the voting power on the Board. They point out that if, instead of assuming the independence of the Hempstead supervisors, these two supervisors were assumed to cast their votes as a bloc, their voting power would be 88.9 % of the total, a figure which might well lead the scheme to be considered unconstitutional and in violation of the Voting Rights Act.

by this Court. He recognizes that a lower court is bound only by issues properly raised in the earlier case. *Id.* at 162-64 (Appendix A at A-16 to A-21). He recognizes, too, that " 'Summary actions should . . . not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved.' " *Id.* at 164 (Appendix A at A-20) (quoting *Mandel v. Bradley*, 432 U.S. 173, 176 (1976)).

Beginning with *Mandel v. Bradley*, 432 U.S. 173 (1976), this Court, while regularly citing *Hicks v. Miranda*, 422 U.S. 332 (1975), for the proposition that summary dispositions are binding, has increasingly restricted the reach of such precedents. In recent cases, this Court has repeatedly said that, "although summary dispositions are decisions on the merits, the decisions extend only to 'the precise issues presented and necessarily decided by those actions.' " *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 499 (1981) (quoting *Mandel v. Bradley*, 432 U.S. 173, 176 (1976)); *see also Hicks v. Miranda*,, 422 U.S. 332, 345 n.14 (1975); *Edelman v. Jordan*, 415 U.S. 651, 671 (1974).

A similarly restrictive view of the precedential value of a summary dismissal was taken by this Court in *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 477 n.20 (1979). In denying the precedential value of earlier dismissals, this Court said, "Our summary dismissals are, of course, to be taken as rulings on the merits, *Hicks v. Miranda*, 422 U.S. at 343-345, in the sense that they rejected the 'specific challenges presented in the statement of jurisdiction' and left 'undisturbed the judgment appealed from.' *Mandel v. Bradley*, 432 U.S. 173, 176. They do not, however, have the same precedential value here as does an opinion of this Court after briefing and oral argument on the merits." *Id.* at 477 n.20.

Other cases make clear that the issue in question must have been explicitly raised in order for the summary action to be considered binding. In *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979), appellee mounted an equal protection challenge to a provision of the Illinois Election Code that had been the subject of an earlier equal protection challenge. The earlier challenge had framed the equal protection violation as

creating an impermissible burden on independent candidates as compared with candidates of established parties. The later challenge framed the violation as involving discrimination between independent candidates running in statewide elections and independent candidates running in city elections. This very issue had been raised in the earlier case, in a memorandum filed with the district court by the State of Illinois. But, this Court stated, "Although the jurisdictional statement alluded to the State's memorandum, and incorporated it as a separate appendix, at no point did it directly address the question now before us. This omission disposes of appellant's argument" that the earlier decision constitutes a binding precedent. *Id.* at 182 (citations omitted). This Court went on to say, "Questions which 'merely lurk in the record,' *Webster v. Fall*, 266 U.S. 507, 511 (1925), are not resolved, and no resolution of them may be inferred." *Id.* at 183.

There could hardly be a better example of a question "lurking in the record" than the one raised here: the issue under consideration was not recognized by the plaintiffs in *Franklin v. Krause* until after the appeal in that case was dismissed, when the error was pointed out by Professor Scarrow. *See* Grofman & Scarrow, *supra* p. 7, at 297. Thereafter, but before the reapportionment occasioned by the 1980 census, suit was brought seeking to have *Franklin v. Krause* overturned. The New York Supreme Court's judgment dismissing the complaint was affirmed by the Appellate Division and by the Court of Appeals, both of which concluded that they were "precluded by the doctrine of *stare decisis* from making a different determination on the merits." *Bechtle v. Board of Supervisors of the County of Nassau*, 54 N.Y.2d 674, 675, 425 N.E.2d 897, 898, 442 N.Y.S.2d 509, 509 (1981) (agreeing with *Bechtle v. Board of Supervisors*, 81 A.D.2d 570, 441 N.Y.S.2d 403 (1981)). Since no appeal of that decision was taken to this Court, the precise issue raised by Petitioners — the method of calculating deviations in a Banzhaf weighted voting system — has never before been raised in this Court. Nor has the post-1980 reapportionment of Nassau County been before this Court.

Judge Neaher attempts to show that this Court did in fact consider the method of calculation in *Franklin v. Krause*, and that the Court of Appeals was bound by this precedent. He quotes from

the County's brief to this Court to show that the method of calculation of the deviation was made explicit. *League of Women Voters*, 737 F.2d at 168-69 (Appendix A at A-31, A-32). However, the County's brief to this Court in *Franklin v. Krause*, as quoted by the opinion below, does no more than present again the incomplete calculations discussed in Point I. The brief is completely vague about the method of calculation. The jurisdictional statement did not challenge, and could not have challenged, the method of calculation because the appellants were unaware of the basic error in the method of calculation. See *supra* p. 17. As *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979), shows, the mere presence in the record of facts that would have permitted this Court to consider an issue is not enough to render a summary disposition binding on that issue.

Alternatively, if the question presented in this case is held to be governed by *Franklin v. Krause*, then *Franklin v. Krause* should be overruled, for all the reasons stated in Point I.

CONCLUSION

In light of the treatment of *Franklin v. Krause* by the court below and by the New York Court of Appeals, *Bechtle v. Board of Supervisors of the County of Nassau*, 54 N.Y.2d 674, 425 N.E.2d 897, 442 N.Y.S.2d 509 (1981), only substantive action by this Court can rectify the Nassau County situation. Thus, petitioners Judith Schmertz and Barbara Josepher respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Second Circuit, and that the Court summarily dispose of this petition on the merits by reversing the judgment below.

Respectfully submitted,

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TABLE I[7]

Local Law	Case	Expert
Cayuga Local Law 3-1982 (March 16, 1982)		Report of L. Papayanopoulos to Cayuga County Board of Legislators (Nov. 1981)
Chenango Local Law 4-1981 (Oct. 3, 1981)		Report of L. Papayanopoulos to Chenango County Board of Supervisors (August 1981)
Chenango	*Pokorny v. Board of Supervisors of Chenango County*, 59 Misc. 2d 929,	L. Papayanopoulos

[7] Tables showing the method of calculation of total deviations are annexed to the local laws in some instances; in others, reports of experts containing the tables are on file with the county clerk. Some of the cases include tables; in others, the tables are in the records for those cases.

	302 N.Y.S.2d 358 (Sup. Ct. Chenango County 1969)	
Cortland Local Law 2-1972 (April 5, 1972)		Report of G. Feissner to Cortland County Legislature (1981)
Delaware Local Law 1-1976 (Aug. 11, 1976)		Report of L. Papayanopoulos to Delaware County Board of Supervisors (May 1976)
Essex Local Law 2-1973 (Feb. 2, 1973)	*Jones v. Board of Supervisors of the County of Essex*, 46 A.D.2d 102, 361 N.Y.S.2d 718 (1974)	Report of L. Papayanopoulos to Essex County Board of Supervisors (Dec. 1972)

Hamilton	*Kattrein v. Board of Supervisors of the County of Hamilton*, No. 2646 (Sup. Ct. Hamilton County Jan. 6, 1969)	L. Denny
Jefferson Resolution 203 (Dec. 8, 1981)		Report of L. Papayanopoulos to Jefferson County Board of Supervisors (1981)
Livingston Local Law 2-1971 (July 12, 1971)		Report of L. Papayanopoulos to Livingston County Board of Supervisors (June 1971)
Ontario Local Law 1-1982 (Feb. 22, 1982)		Report of L. Papayanopoulos to Ontario County Board of Supervisors (Dec. 1981)
Rockland	*English v. Lefever*, 94 A.D.2d 755, 462 N.Y.S.2d 695 (1983)	L. Papayanopoulos (*See* Appendix E)

St. Lawrence	*Monroe v. Board of Supervisors County of St. Lawrence*, 73 Misc. 2d 327, 342 N.Y.S.2d 189 (Sup. Ct. St. Lawrence County 1973)	Report of L. Papayanopoulos (Nov. 1972)
Saratoga Local Law 2-1981 (July 14, 1981)		Reapportionment Analysis of R. Sacher (Nov. 30, 1980)
Schoharie Local Law 1-1982 (March 19, 1982)		Report of L. Papayanopoulos to Schoharie County Board of Supervisors (Nov. 1981)
Seneca	*Glessing v. Rockefeller*, No. 13299, (Sup. Ct. Seneca County Oct. 26, 1967)	

Sullivan Resolution 102 (Mar. 12, 1984) and annexed exhibits A and B)	*Greenwald v. Board of Supervisors of the County of Sullivan*, 82 Civ. 5488, (S.D.N.Y. Mar. 28, 1984) (Weinfeld, J.) (stipulation and order)	Report of L. Papayanopoulos to Board of Supervisors of the County of Sullivan (June 19, 1982)
Tompkins Resolution 346 (Dec. 10, 1981)		Report of W. Lucas & J. Maceli to Tompkins Board of Representatives (Dec. 1981)
Washington Resolution 79, Washington County Board of Supervisors (Mar. 19, 1982)		L. Papayanopoulos
Wayne	*Dobish v. State*, 54 Misc. 2d 367, 282 N.Y.S.2d 791 (Sup. Ct. Wayne County 1967)	L. Papayanopoulos

APPENDIX

BEST AVAILABLE COPY

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 326—August Term 1983

(Argued November 18, 1983 Decided May 22, 1984)

Docket No. 83-7602

THE LEAGUE OF WOMEN VOTERS OF NASSAU COUNTY, CAROL CARLTON, JUDITH SCHMERTZ, BARBARA JOSEPHER, ADELE FOX and ANN BORNER,

Plaintiffs-Appellants,

—v.—

NASSAU COUNTY BOARD OF SUPERVISORS, THOMAS GULOTTA, as Presiding Supervisor of Town of Hempstead, JAMES BENNETT, as Supervisor of Town of Hempstead, JOHN KIERNAN, as Supervisor of Town of North Hempstead, HANNAH KOMANOFF, as Supervisor of City of Long Beach, JOSEPH COLBY, as Supervisor of the Town of Oyster Bay, and ALAN PARENTE, as Mayor-Supervisor of City of Glen Cove,

Defendants-Appellees.

Before:

OAKES and MESKILL, *Circuit Judges*,
and NEAHER, *District Judge.**

Appeal from an order of the United States District Court for the Eastern District of New York, Jacob Mishler, *Judge*, granting defendants' motion for summary judgment and dismissing the complaint on the grounds that Nassau County Local Law 2-1982, which reapportioned the Nassau County Board of Supervisors' weighted voting system, is constitutional.

Judgment affirmed.

CHARLES ROBERT, Robert & Schneider, Hempstead, New York, *for Plaintiffs-Appellants.*

DONALD J. WERNER, Curtis, Hart & Zaklukiewicz, Merrick, New York, *for Defendants-Appellees.*

NEAHER, *District Judge*:

Plaintiffs, the League of Women Voters ("League") and five members, appeal from a judgment of the United States District Court for the Eastern District of New

* Of the Eastern District of New York, sitting by designation.

York, Jacob Mishler, *Judge*. Plaintiffs had sued the Nassau County Board of Supervisors ("Board") and its six member supervisors, charging that Nassau County Local Law 2-1982, which reapportioned the Board's weighted voting system after the 1980 census, violated the equal protection clause of the fourteenth amendment to the United States Constitution. After rejecting that constitutional challenge, Judge Mishler granted defendants' motion for summary judgment and dismissed the complaint.

While agreeing with that disposition, we find that it was unnecessary to reach plaintiffs' equal protection argument because, aside from one meritless issue, this case is controlled by the Supreme Court's earlier decision in *Franklin* v. *Krause*, 344 N.Y.S.2d 885 (1973), *appeal dismissed*, 415 U.S. 904 (1974). Accordingly, we affirm but on the basis of that prior Supreme Court summary adjudication.

FACTS

New York State's Nassau County is governed by the Board, whose six members are the chief executives of the cities of Glen Cove and Long Beach, and the Towns of Hempstead, Oyster Bay and North Hempstead.[1] Since 1917, the Board has used a weighted voting system,[2] which has been the subject of other litigation.

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1 As the most populous political subdivision, the Town of Hempstead actually has two officials—a Presiding Supervisor and a Supervisor—on the Board. *See* Nassau County Government Law § 104(4)(f), App. at 25.

Note: Besides App. for Appendix, the following abbreviations will be used: Pl. for Plaintiffs; Def. for Defendants; Br. for Brief; R. for Reply; Mem. Dec. for Memorandum Decision and Order; Aff. for Affidavit/ Affirmation; and Jur.St. for Jurisdictional Statement.

2 Simply defined, weighted voting is

"a system of representative voting used when the districts which the members represent have unequal numbers . . . . Theoretically,

In *Franklin* v. *Mandeville*, 308 N.Y.S.2d 375 (1970), a case early in reapportionment jurisprudence, the Board's weighted voting plan was also attacked as unconstitutional. Then, as now, despite having a majority of Nassau County's population, the Town of Hempstead was assigned less than a majority of the weighted vote. The New York Court of Appeals held that that allotment violated equal protection.

> "[T]he Town of Hempstead's population constituted 57.12% of the county's population but that town's representatives may cast but 49.6% of the board's vote. Important as is . . . the present inequality, it is of even greater moment that inequality in some degree is mandated and, indeed, perpetuated by the charter provision: 'nor shall the supervisor or supervisors of any town or city be entitled to cast more than fifty per centum of the total vote of said board.' (L. 1936, ch. 879, § 104, subd. 2.) This provision . . . clearly violates the one man, one vote principle. . . . Not only are the Hempstead Supervisors presently barred from . . . a majority vote, but section 104 would continue to deprive them, or the residents of any other town or city subsequently containing a majority of the county population, from majority representation, . . ."

Id. at 377.

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each member of the legislative body is given a weighted vote to offset the differences in numbers of people represented. Thus, a man representing a large district would be given a greater vote than a man representing a small district."

Johnson, "An Analysis of Weighted Voting as Used in Reapportionment of County Governments in New York State", 34 Alb. L. Rev. 1, 10 (1969).

Notwithstanding that illegality, the New York Court of Appeals permitted the weighted voting system to continue until after the 1970 census, so that the new reapportionment plan would be accurately based. A computer analysis was performed, but yet another weighted voting system was proposed. That proposal was contained in Nassau County Local Law 13-1972 ("Local Law 13-1972") to amend Nassau Government Law § 104 ("§ 104").

Outlining the provisions of Local Law 13-1972, one court during the period stated:

> "The new plan . . . is embodied in Local Law No. 13-1972. It continues a structure of town and city Supervisors sitting as Board members, the mandatory decennial reallocation of votes and use of a weighted voting system. . . .
>
> "In fixing the standards for allocating votes, the new law provides that the 'voting power' of a Supervisor shall be measured 'by the mathematical possibility of his casting a decisive vote on a particular matter.' It then equates a town's or city's 'voting power' with that of its Supervisor, or, in the case of Hempstead, with the total voting power of its two Supervisors.
>
> "Futhermore, the percentages of voting power 'shall approximate' the corresponding percentages of population and it further guarantees that no town or city shall be wholly without voting power.
>
> "Finally, . . . the new plan requires that in preparing each reapportionment . . . [the] Board shall employ 'an independent computerized mathematical analysis' and any other methods which shall 'most nearly analyze' the percentages of voting power and population.

"Paragraph 5 of the new law turns from general standards to specific allocation of votes based upon the 1970 census data."

Frankin v. *Krause*, 338 N.Y.S.2d 561, 563 (N.Y. Sup. Ct. 1972), *rev'd*, 344 N.Y.S.2d 885 (1973), *appeal dismissed*, 415 U.S. 904 (1974).[3]

The referred-to paragraph five provided:

"Based on the nineteen hundred seventy federal census the number of votes in each of the following categories is . . . fixed as follows:

"a. For matters requiring a majority of the voting strength of the board of supervisors or a majority of the total voting power of the board of supervisors:

"(1) Total number of votes 130

"(2) Distribution of votes

Presiding Supervisor of Hempstead	35
Supervisor of Hempstead	35
Supervisor of Oyster Bay	32
Supervisor of North Hempstead	23
Supervisor of Long Beach	3
Supervisor of Glen Cove	2

"(3) Votes required for passage ..... 71"[4]

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3 Except for paragraph 5, the record in this case does not contain a copy of Local Law 13-1972, but, as will be seen, its substance eventually became part of § 104. Apparently, due to the delay in ascertaining the constitutionality of Local Law 13-1972, as well as other subsequent delays not relevant here, the actual amendment to § 104 was made by Local Law 5-1975, which seems to have simply been Local Law 13-1972 renumbered. *See* Legislative History of § 104, App. at 26. *See generally Franklin* v. *Krause*, 371 N.Y.S.2d 757 (N.Y. Sup. Ct. 1975). Given that identity and that it was the focus of litigation important to this case, we shall refer to Local Law 13-1972 as the immediate predecessor of Local Law 2-1982.

4 In matters requiring two-thirds of the weighted votes, 92 was the number set for passage.

That allocation resulted in the following deviations:

Municipality	*Population*	*Percent of Population*	*Percent Voting Power*	*Deviation*
Hempstead	801,592	56.2	54.6	−1.6
Oyster Bay	333,342	23.1	20.4	−2.7
No.Hempstead	235,007	16.5	13.0	−3.5
Long Beach	33,127	2.3	5.6	+3.3
Glen Cove	25,770	1.8	5.6	+3.8
TOTAL	1,428,838			

The maximum range of deviation was 7.3%, *i.e.*, North Hempstead's −3.5% computed with Glen Cove's +3.8%.[5]

Importantly, Local Law 13-1972 still left the Town of Hempstead without a majority of the votes (having 70 when 71 was needed), despite the New York Court of Appeals' clear statement in *Franklin* v. *Mandeville*, 308 N.Y.S.2d at 377. Not surprisingly, the new plan was challenged as constitutionally deficient.

In a conceded turnabout, the New York Court of Appeals in *Franklin* v. *Krause*, 344 N.Y.S.2d 885, 892 (1973), held that the weighted voting system under Local Law 13-1972 had "no constitutional infirmity." In reaching that decision, the Court of Appeals acknowledged and endorsed the evolution of reapportionment law, especially in regard to local government.

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5 As later discussed, plaintiffs vigorously dispute these calculations. Concerning the general computation of deviations, *see*, *e.g.*, Bickerstaff, "Reapportionment by State Legislatures: A Guide for the 1980's", 34 Sw. L. J. 607,634 (1980) ("Bickerstaff") ("The most common numerical tool is the use of the percentage of variation from the ideal district to show the 'average deviation' or 'median deviation' of all the districts from the ideal, and the 'total maximum deviation' which is the aggregate total of the percentage of variation from the ideal of the districts with the largest and smallest population.").

"[W]hile the Town of Hempstead Supervisors together possess 70 votes, more than a majority of the total 130, they cannot have 55% voting power which would ordinarily be 100% voting power in a 'pure majority' situation. This admittedly artificial voting requirement . . . gives the Town of Hempstead a greater disenfranchisement than . . . in certain voting combinations.

"This is precisely the point which caused our rejection of the former plan . . . . At the time that decision was handed down, the preachment was that one man, one vote had to be applied at all levels of government with mathematical certitude and this court was concerned with the scope of Hempstead's disenfranchisement. In the intervening years this stricture has been considerably softened with respect to local level government and this reshaping is most desirable, as demonstrated in the case at bar."

Id. at 888.

The *Frankin* v. *Krause* plaintiffs, with the League intervening, appealed to the Supreme Court. Before doing so, however, they moved to amend the remittitur. The New York Court of Appeals granted the motion, thereby clarifying that the constitutionality of Local Law 13-1972 had indeed been decided.

"[T]here were presented, and necessarily passed upon, questions arising under the Constitution of the United States, viz: (1) whether Local Law No. 13-1972 of Nassau County is unconstitutional because it deprives plaintiffs of the equal protection of the laws as well as due process of law . . . ; and (2) whether said Local Law, because it utilizes weighted voting, is unconstitutional *per se* in that it violates the plain-

> tiffs' right to equal protection of the laws and to due process of law . . . . The Court of Appeals held there was no violation of any of plaintiffs' constitutional rights."

Franklin v. *Krause*, 348 N.Y.S.2d 554 (1973).

The Supreme Court received the case under its mandatory appellate jurisdiction, 28 U.S.C. § 1257(2), but dismissed for want of a substantial federal question. *Franklin* v. *Krause*, 415 U.S. 904 (1974). Thus, the constitutional gauntlet of Nassau County's weighted voting system was evidently ended, and the provisions of Local Law 13-1972 became effective on January 1, 1976 as part of § 104.[6]

The constitutional calm was brief. Section 104(3) provides:

> "In accordance with . . . subdivision four . . . , the board of supervisors shall, not later than six months after the publication of the results of each federal decennial census by appropriate amendment to subdivision five . . . , propose a reapportionment of the voting power . . . ."

And § 104(4) states:

> "g. The percentage of voting power of each town and city . . . shall approximate the town's or city's percentage of the total county population.
>
> "h. In preparing each reapportionment, the board of supervisors shall employ an independent computerized mathematical analysis and such other . . . methods as shall most nearly equalize the percentage

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6 *See supra* p. 4 & note 3.

of voting power of each town and city to its percentage of the total county population."

As required by those provisions, after the 1980 census and a computer analysis, the Board was to be reapportioned by an amendment to § 104(5). The amendment eventually enacted was Nassau County Local Law 2-1982 ("Local Law 2-1982")—ostensibly, the focus of this lawsuit. Except for mathematical adjustments reflecting Nassau County's population changes since the 1970 census, Local Law 2-1982 is a verbatim version of § 104(5) as originally embodied in paragraph five, *supra*, of Local Law 13-1972.

"Based on the nineteen hundred eighty federal census, the number of votes in each of the following categories is . . . fixed as follows:

"a) For matters requiring a majority of the voting strength of the board of supervisors or a majority of the voting power of the board of supervisors:

"(1) Total number of votes 108

"(2) Distribution of votes

Presiding Supervisor of Hempstead	30
Supervisor of Hempstead	28
Supervisor of Oyster Bay	22
Supervisor of North Hempstead	15
Supervisor of Long Beach.....	7
Supervisor of Glen Cove.....	6

"(3) Votes required for passage ..... 65"[7]

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[7] The number of votes now set for two-thirds passage is 72.

This allocation results in the following deviations:

Municipality	*Population*	*Percent of Population*	*Percent Voting Power*	*Deviation*
Hempstead	738,517	55.92	53.85	- 2.07
Oyster Bay	305,750	23.12	21.15	- 1.97
No.Hempstead	218,624	16.53	17.31	+ .78
Long Beach	34,073	2.58	5.77	+3.19
Glen Cover	24,618	1.86	1.92	+ .06"[8]
TOTAL	1,321,582			

As seen, due to Nassau County's population decrease, the total votes are reduced to 108. Once again and (now) pursuant to § 104(4)(g)-(h), *supra*, the municipalities are assigned votes proportionate to their respective populations. Still, the Town of Hempstead is denied a majority.[9]

Significantly, the maximum range of deviation under Local Law 2-1982 of 5.26% (the Town of Hempstead's -2.07% computed with Long Beach's +3.19%) is *less than* the 7.3% under Local Law 13-1982. But, that diminished disparity and the numerical vote allotment are the *only* differences between Local Law 2-1982 and its predecessor—paragraph 5 of Local Law 13-1972.

In any event, Local Law 2-1982 was submitted to the Board, which after public hearings, adopted it on March 8, 1982. Nassau County's Chief Executive signed it on the same day, and, after being approved in a referendum, Local Law 2-1982 became effective on January 1, 1983.

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8 These calculations, too, are disputed by plaintiffs.

9 The rationale for this denial (the "majority without a majority vote" or "built-in bias" aspect of weighted voting) is "to assure that sparsely populated areas of a political unit of government have a voice in the councils of government." *Greenwald* v. *Board of Supervisors of the County of Sullivan*, 567 F. Supp. 200, 203 (S.D.N.Y. 1983) (footnote omitted). For a fuller explication, *see Ianucci* v. *Board of Supervisors of the County of Washington*, 282 N.Y.S.2d 502, 507-08 (1967).

Prior to that referendum, however, plaintiffs had filed this lawsuit seeking unsuccessfully to enjoin it. Thus Nassau County's weighted voting plan is again under constitutional attack—this time through the enactment of Local Law 2-1972.[10]

DISCUSSION

A. *Standing*

Plaintiffs have brought this suit under 42 U.S.C. § 1983 through its legislative implementation, 28 U.S.C. § 1343(3). Defendants correctly maintain that the League does not have standing to assert the rights of its mem-

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10 Of New York State's 57 counties (outside of New York City), 24 employ weighted voting systems. Grofman & Scarrow, "Weighted Voting in New York", IV Legis. L. Q. 287, 288 (May 1981), App. at 64. Unsurprisingly, given the prevalence of such representational plans, the subjection of Nassau County's weighted voting system to constitutional litigation has not been atypical. *See Imbriani* v. *Board of Supervisors of Sullivan County*, 568 F. Supp. 1581, 1581 (S.D.N.Y. 1983) (upholding the constitutionality of the weighted voting system of the Board of Supervisors of Sullivan County); *Greenwald* v. *Board of Supervisors of Sullivan County*, 567 F. Supp. at 206 (same); *English* v. *Lefever*, 462 N.Y.S.2d 695, 696 (N.Y. App. Div. 1983) (declaring unconstitutionally apportioned Rockland County's legislature having a 37.15% deviation, where defendants failed to prove that their plan had "no practical alternatives"); *Jones* v. *Board of Supervisors of the County of Essex*, 361 N.Y.S.2d 718, 720 (N.Y. App. Div. 1974) (upholding the constitutionality of the Board of Supervisors of Essex County where a 1.993% deviation was "so small as to create substantial equality"); *Town of Carmel* v. *Board of Supervisors of Putnam County*, 318 N.Y.S.2d 503, 505 (1970) (allowing a weighted voting plan for the malapportioned Board of Supervisors of Putnam County "solely as a temporary, interim measure" until another plan could be adopted after the 1970 census); *Iannucci* v. *Board of Supervisors of the County of Washington*, 282 N.Y.S.2d at 509 (proposed weighted voting plans for Boards of Supervisors of Washington and Saratoga Counties were of "doubtful constitutional validity", necessitating a computer analysis to show otherwise); *Shilbury* v. *Board of Supervisors of the County of Sullivan*, 260 N.Y.S.2d 931,937 (N.Y. Sup. Ct. 1965), *aff'd*, 267 N.Y.S.2d 1022 (N.Y. App. Div. 1966) (though later permanently adopted, a weighted voting plan permitted as a "stopgap" measure for the malapportioned Board of Supervisors of Sullivan County).

bers.[11] This Circuit has restricted organizational standing under § 1983 by interpreting the rights it secures to be personal to those purportedly injured. *Aguayo* v. *Richardson*, 473 F.2d 1090 (2d Cir. 1974), *cert. denied*, 414 U.S. 1146 (1974). As we there pointed out:

> "Neither [the] language nor the history . . . [of § 1983] suggests that an organization may sue under the Civil Rights Act for the violations of rights of members."

Id. at 1099. *See also Albany Welfare Rights Organization* v. *Wyman*, 493 F.2d 1319, 1321-22 (2d Cir. 1974) (A welfare rights organization had standing under § 1983 because the asserted injury was to the right of association, an avenue left open in *Aguayo*); *Warth* v. *Seldin*, 495 F.2d 1187, 1194 (2d Cir. 1974); *aff'd on other grounds*, 422 U.S. 490, 516-17 (1975) (In denying standing to a housing organization, this court added, "It is highly doubtful that an organization has standing to represent its members in most cases under the Civil Rights Act.").

Necessarily, we adhere to our prior decisions and, consequently, hold that the League lacks standing under § 1983, the only jurisdictional basis asserted.[12]

Defendants are similarly correct in contending that plaintiffs Carlton, Fox and Borner, who live in Long

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11 The standing issue was raised but not decided below.

12 Plaintiffs cite *Baker* v. *Carr*, 369 U.S. 186 (1962), as authorizing the League's participation here. Although silent about organizational standing, the Supreme Court observed that a mayor and certain cities, as intervenors, were trying to sue on behalf of their constituents. But the Court declined to reach that representational standing issue.

> "Since they press the same claims as do the initial plaintiffs, we find it unnecessary to decide whether the intervenors would have standing to maintain this action in their asserted representative capacities."

Id. at 205 n.23.

Beach, North Hempstead and Glen Cove, respectively, lack standing, as well. These voters reside in overrepresented municipalities, *i.e.*, political subdivisions that have percentages of the Board's voting power greater than their percentages of Nassau County's population. Hence, as voters from overrepresented municipalities, these plaintiffs cannot claim any injury.

The issue whether plaintiffs such as these have standing was addressed in *Fairley* v. *Patterson*, 493 F.2d 598 (5th Cir. 1974). There, the Fifth Circuit held that the plaintiffs, who had not alleged that they resided in underrepresented voting districts, lacked standing to contest a reapportionment law. *Id.* at 604. In so holding, the Fifth Circuit stated:

> "Under appellants' first claim, a traditional one man, one vote argument, the Supreme Court has conclusively established in Baker v. Carr, 369 U.S. 186, 204-208, . . . (1962), and Reynolds v. Sims, 377 U.S. 533, 554-561, . . . (1964), that sufficient damage through underrepresentation to obtain standing will be inflicted if population equality among voting units is not present. However, injury results only to those persons domiciled in the *underrepresented* voting districts."

Id. at 603 (emphasis in original) (footnote omitted). *Cf. Minority Police Officers Association of South Bend* v. *City of South Bend*, 721 F.2d 197, 202 (7th Cir. 1983) (in a § 1983 case for alleged hiring discrimination, minority police officers, "who [were] all employees, [could not] represent . . . unsuccessful applicants, all of whom [were] by definition nonemployees.") (citing *Fairley*).

Fairley aside, plaintiffs again invoke *Baker* v. *Carr*, 369 U.S. at 208, as authority for standing generally in reapportionment suits. However, as the just-quoted passage in

Fairley indicates, plaintiffs' reliance on *Baker* v. *Carr* stems from less than a close reading of that case. In contrast to the municipalities in which Carlton, Fox and Borner dwell, the *Baker* v. *Carr* voter appellants lived in *underrepresented* areas.

> "The injury which appellants assert is that this classification disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality *vis-a-vis* voters in irrationally favored counties."

Id. at 207-08.

Notably, the Supreme Court explicitly declined to decide whether overrepresented voters had standing.

> "The complaint also contains an averment that the appellants sue 'on their own behalf and *on behalf of all other voters* in the State of Tennessee.' . . . This may be read to assert a claim that voters in counties allegedly over-represented in the General Assembly also have standing to complain. But it is not necessary to decide that question in this case."

Id. at 205 n.24 (emphasis in original). In brief, plaintiffs' summoning of *Baker* v. *Carr* is to no avail. *See* L. Tribe, American Constitutional Law 87 n.40 (1978) ("The Court [in *Baker* v. *Carr*] found it unnecessary to decide whether [overrepresented voters had standing] . . . . Under the theory that limits standing to cases where the litigant's own material interests are adversely affected, such voters quite plainly would *not* have standing.") (emphasis in original).

Independent of *Baker* v. *Carr*'s nonsupport, we agree with the Fifth Circuit. Therefore, Carlton, Fox and Borner, who are not "persons domiciled in *underrepre-*

sented voting districts," lack standing to prosecute this appeal. *Fairly* v. *Patterson*, 493 F.2d at 603 (emphasis in original).

Defendants, nevertheless, do not contest the standing of Schmertz, a Town of Hempstead resident, and Josepher, an Oyster Bay resident. Those plaintiffs live in underrepresented municipalities, *i.e.*, political subdivisions that have percentages of the Board's voting power less than their percentages of Nassau County's population.

That being so, Schmertz and Josepher have seemingly incurred injury. The inquiry on appeal, then, will proceed only as to them. *See Baker* v. *Carr*, 369 U.S. at 206 ("[V]oters who allege facts showing disadvantage to themselves have standing to sue.") (construing *Colegrove* v. *Greene*, 328 U.S. 549 (1946)) (footnote omitted).

B. *Substantial Federal Question*

As previously noted, except for the numerical reassignment of votes and the lessened disparity, Local Law 2-1982 is identical in fact and in effect to its Local Law 13-1972 counterpart, paragraph 5. Undeterred by that semblance as well as Local Law 2-1982's limited, mechanistic changes, plaintiffs challenge Nassau County's weighted voting system *as a whole*.

Plaintiffs' litigation strategy aside, defendants argue that the Supreme Court's summary adjudication in *Franklin* v. *Krause*, 344 N.Y.S.2d 885 (1973), *appeal dismissed*, 415 U.S. 904 (1974), which upheld Nassau County's weighted voting system *as a whole* under the comprehensive Local Law 13-1972, is dispositive of the present suit. We agree. The Supreme Court's dismissal for lack of a substantial federal question then is binding now.

In *Hicks* v. *Miranda*, 422 U.S. 332 (1975), the Supreme Court clarified the import of its summary adjudications on later lower court decisions. There, a three-judge court had declared a State obscenity statute unconstitutionally vague. In doing so, the three-judge court had not deemed controlling an earlier State decision holding the statute valid—although the Supreme Court had dismissed the appeal from that State case for lack of a substantial federal question. *Miller* v. *California*, 418 U.S. 915 (1974) ("*Miller II*").

In reversing the three-judge court, the Supreme Court outlined the rationale underlying such a dismissal along with the deference it should have been accorded.

> "That case was an appeal from a decision by a state court upholding a state statute against federal constitutional attack. A federal constitutional issue was properly presented, it was within our appellate jurisdiction under 28 U.S.C. § 1257(2), and we had no discretion to refuse adjudication of the case on its merits . . . . We are not obligated to grant the case plenary consideration, and we did not; but we were required to deal with its merits. We did so by concluding that the appeal should be dismissed because the constitutional challenge to the [state] statute was not a substantial one. The three-judge court was not free to disregard this pronouncement."

Hicks v. *Miranda*, 422 U.S. at 343-44.

Later, in a footnote, the Supreme Court checked the potential expanse of its language.

> "Of course, *Miller II* would have been decisive here only if the issues in *Miller II* and the present case were sufficiently the same that *Miller II* was a

> controlling precedent. Thus, had the District Court considered itself bound by summary dismissals of appeals by this Court, its initial task would have been to ascertain what issues had been properly presented in *Miller II* and declared by this Court to be without substance. *Ascertaining the reach and content of summary actions may itself present issues of real substance*, ..."

Id. at 345 n.14 (emphasis added). *See* Note, "The Precedential Effect of Summary Affirmances and Dismissals for Want of a Substantial Federal Question by the Supreme Court After *Hicks* v. *Miranda* and *Mandel* v. *Bradley*," 64 Va. L. Rev. 117, 122-23 (1978) ("Note, 'Precedential Effect' ") ("That footnote, rather than the sweeping words of the text, is the most informative passage in *Hicks*. The text announces the general principle; the note describes the limits of its reach. Only footnote fourteen states clearly that the precedential value of a summary disposition by the Supreme Court extends to a limited range of issues.").

The Supreme Court further illuminated the parameters of such dispositions in *Mandel* v. *Bradley*, 432 U.S. 173 (1976). There, an independent candidate for a federal office challenged a Maryland statute requiring all independents desiring placement on the general election ballot to file a certificate of candidacy 70 days before the party primaries, in addition to signatures of 3% of the voters. Relying on a summary affirmance in *Tucker* v. *Salera*, 399 F. Supp. 1258 (E.D. Pa. 1975), *aff'd*, 424 U.S. 459 (1976) ("*Salera*"), which had declared another State's early filing statute unconstitutional, the three-judge court held that the Maryland statute, in like manner, was unconstitutional.

Vacating and remanding, the Supreme Court perceived the facts in *Salera* to be "very different" from those before the three-judge court. *Mandel* v. *Bradley*, 432 U.S. at 177. In *Salera*, besides an early filing date, the signatures had to be obtained during a 21-day period. The Supreme Court concluded:

> "This combination of an early filing deadline and the 21-day limitation on signature gathering is sufficient to distinguish *Salera* from the case now before us, where there is no limitation on the period within which such signatures must be gathered. In short, *Salera* did not mandate the result reached by the District Court in this case."

Id.

Before reaching that conclusion, the Supreme Court gathered the law on summary adjudications and, while doing so, underscored the tasks of lower courts.

> "The District Court erred in believing that our affirmance in *Salera* adopted the reasoning as well as the judgment of the three-judge court in that case . . . . *Hicks* v. *Miranda* . . . held that lower courts are bound by summary actions on the merits by this Court, but we noted that *'[a]scertaining the reach and content of summary actions may itself present issues of real substance.'* Because a summary affirmance is an affirmance of the judgment only, the rationale of the affirmance may not be gleaned solely from the opinion below.
>
> > 'When we summarily affirm, without opinion, . . . we affirm the judgment but not necessarily the reasoning by which it was reached. An unexplicated summary affirmance settles the is-

> sues for the parties, and is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument.' (Footnote omitted.) *Fusari* v. *Steinberg*, 419 U.S. 379, 391-392 (1975) (Burger, C.J., concurring).
>
> "Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions. . . . Summary actions . . . should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved."

Id. at 176 (emphasis added).

Read together, then, as *Hicks* mentioned but *Mandel* brought to the fore, this Court's responsibility in gauging *Franklin* v. *Krause's* authority over the present case is to mark out the "reach and content" of that prior disposition. *See Delta Air Lines, Inc.* v. *Kramarsky*, 650 F.2d 1287, 1295 (2d Cir. 1981), *aff'd in part and vacated in part*, 666 F.2d 21 (1981), *aff'd in part, vacated in part and remanded sub nom. Shaw* v. *Delta Air Lines, Inc.*, ____ U.S. ____, 103 S.Ct. 2890 (1983) ("In attempting to apply the rule resulting from . . . a summary decision . . . lower courts must undertake a careful analysis of the precise 'reach and content' of the Supreme Court's action.") (citing *Mandel* and *Hicks*). *See generally* Note, "Precedential Effect," *supra*, 61 Va. L. Rev. at 141 ("In *Hicks* the directive to consider carefully the 'reach and content' of the earlier decision, and to determine 'what

issues had been properly presented . . .' had been banished to a footnote. In *Mandel*, it became the focal point . . . .").

1. *A Comparison of Questions and Issues Presented*

At the time of *Franklin* v. *Krause*, Sup. Ct. R. 15(1)(c) related:

> "The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the jurisdictional statement *or fairly comprised therein* will be considered by the court."

28 U.S.C.A. Sup. Ct. Rs. (1977) (emphasis added).[13]

In accordance with that rule, the *Franklin* v. *Krause* plaintiffs offered these "Questions Presented":

> "1. Whether weighted voting is unconstitutional *per se* as a plan of permanent apportionment for a unicameral, County legislative body having general governmental powers.
>
> "2. Whether a plan of apportionment for a County legislative body having general governmental powers constitutionally may prevent the representatives of one local unit (Town of Hempstead) containing more than 57% of the County population, from casting sufficient votes to pass legislative measures requiring a simple majority vote.
>
> "3. Whether a plan of apportionment for a County legislative body having general governmental

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13 Amended in 1980, Sup. Ct. R. 15(1)(c) was renumbered as Sup. Ct. R. 15.1(a). 28 U.S.C.A. Sup. Ct. Rs. (1977 & Supp. 1983). The quoted portion of former Sup. Ct. R. 15(1)(c) does not differ meaningfully from the present version. *See id.*

> powers constitutionally may create an artificial "majority" requirement so that elected representatives of 57% of the County population do not hold sufficient votes to pass legislative measures requiring a simple majority vote."

Appellants' Jur. St. at 3, App. at 293.

Before this court, plaintiffs offer the following "Issues Presented for Review":

> "1. Did the lower Court err by not holding evidentiary hearings from which to make specific findings of fact?
>
> "2. Is computerized weighted voting using the Banzhaf weighted voting power methodology unconstitutional per se?
>
> "3. Was the percentage point deviation test used by the lower Court, the correct mathematical test to use to review the reapportionment plan?
>
> "4. Is there an impermissible built-in bias in the Nassau plan?
>
> "5. Is computerized weighted voting in a local legislative body with general governmental powers unconstitutional per se?"

Pl. Br. at 2.

a. *Issue 1: Evidentiary Hearing*

Decidedly, Issue 1 here was not before the Supreme Court. Nor for that matter was it before Judge Mishler—at least with any consistency. Initially, plaintiffs sought an evidentiary hearing. *See, e.g.*, Aff. ¶ 22, App. at 36 ("[A] hearing is requested . . . for the proponents of the Nassau County plan to carry their burden."). Yet, plain-

tiffs later cross-moved for summary judgment stating that "there are [sic] no dispute in facts, but rather, interpretations of mathematics and applicable law which does not require this Court to hold a trial."). Aff. ¶ 24, App. at 337.

Notwithstanding that certitude, plaintiffs' position sharply changed again—after Judge Mishler's May 18, 1983 decision. Purportedly, *Morris* v. *Board of Estimate*, 707 F.2d 686 (2d Cir. 1983), which had been issued on May 16, 1983, dictated that turnaround. In a motion pursuant to Fed. R. Civ. Pro. 60(b)(6), plaintiffs enumerated the contested facts suddenly necessitating a trial.

> "[P]laintiffs respectfully request that their motion for relief from judgment . . . be granted and this matter be set down for a trial . . . for the Court to determine the findings of fact per the holding of *Morris* v. *Board of Estimate*."

Aff., App. at 379.

Despite misgivings about Issue 1's authenticity due to plaintiffs' vacillation, we address it but find *Morris* not mandating a trial in this case. There, after holding that the one person, one vote rule applied to the Board of Estimate, the *Morris* court stated:

> "Because the district court found the one person, one vote rule inapplicable, no findings were made concerning the level of malapportionment, the weight of the state interests alleged to justify whatever level of deviation exists or whether the combination of at-large and local seats, in the context of the voting procedures of the Board, creates a system of representation that satisfies constitutional standards for instruments of local government. It is therefore

> proper to remand the case to the district court so that it can make such findings.
>
> "Upon remand, the district court must determine the degree of malapportionment present (after deciding on the appropriate methodology for doing so) and rule on the policies and interests which the Supreme Court has held may justify deviations from the literal one person, one vote formula."

Morris v. *Board of Estimate*, 707 F.2d at 690 (footnote omitted).

Nowhere does *Morris* direct a hearing. To the contrary, *Morris* leaves that determination to the considered discretion of the district court who "*may* find it desirable to amplify the record." *Id.* at 691 (emphasis added). Further, even were the district court to deem amplification warranted, additional submissions might be sufficient, depending on—as in most suits—what issues require development. In any event, *Morris* simply does not stand for the principal proposition asserted.

Apart from that misinterpretation, *Morris* is distinguishable on its face. In that case, as mentioned, the district court had determined that the one person, one vote rule did not apply to the Board of Estimate and, consequently, had not made certain findings. Here, however, that rule's relevance was never contested. In addition, the appropriate findings were made.

For example, Judge Mishler accepted the malapportionment level as 5.26%, Mem. Dec. at 6, App. at 359, and, thereby, pointedly rejected plaintiffs' mathematics.

> "According to plaintiffs, their approach is the proper mathematic method for testing a weighted voting plan under *Reynolds v. Sims*, 377 U.S. 533,

> . . . (1964). We find no such suggestion in *Reynolds*."

Id. at 8 and 361, respectively.

Judge Mishler, likewise, did the required weighing between the equal protection guarantee and the proffered governmental policies.

> "We find that the plan for the apportionment of votes on the Nassau County Board of Supervisors, contained in Local Law 2-1982, is an adequate compromise between the constitutional one man, one vote requirement and the County's interest in preserving existing subdivision lines and the existing legislative structure."

Id. at 12 and 365, respectively. *See generally* R. Dixon, Democratic Representation—Reapportionment in Law and Politics 518 (1968) ("Arithmetically viewed, weighted . . . voting [is] in line with the Supreme Court's announced goal [in *Reynolds* v. *Sims*, 377 U.S. at 579] of 'substantial equality of population'; moreover, [it] achieve[s] this while maintaining concern for the Court's corollary interest in 'integrity of various political subdivisions.' [*Id.* at 578].").

To conclude the *Morris* discussion, while not directing a hearing as a matter of course, it does instruct that certain findings be made *when* the one person, one vote rule is operative. In this case, having made those findings, the district court complied with *Morris*.

Besides *Morris*, plaintiffs also contend that *Karcher* v. *Daggett*, ____ U.S. ____, 103 S.Ct. 2653 (1983), and *Brown* v. *Thomson*, ____ U.S. ____, 103 S.Ct. 2690 (1983), companion cases also decided after Judge Mishler's opinion, similarly require a hearing. The court disagrees, too, with that interpretation of those cases.

In *Karcher*, the Supreme Court invalidated a New Jersey congressional redistricting plan with a deviation of less than 1% because, though small, that disparity was not due to a good faith effort towards population equality. *Karcher* v. *Daggett*, ____ U.S. at ____, 103 S.Ct. at 2665.

Brown, on the other hand, upheld a Wyoming statute permitting each county to have at least one member in the State house of representatives, despite a resultant 89% maximum deviation. The Supreme Court approved the apportionment because Wyoming had a longstanding, legitimate policy of providing each county with a representative *and* because the deviation issue had been removed from the Supreme Court's scrutiny. *Brown* v. *Thomson*, ____ U.S. at ____, 103 S.Ct. at 2698-99.

Like *Morris*, neither *Karcher* nor *Brown* commands that evidentiary hearings automatically be held. In fact, the lower court's "hearing" in *Karcher* was, at the most, a *pro forma* proceeding, the case being taken essentially on submission. The Supreme Court described that proceeding:

> "The District Court held a hearing . . . at which the parties submitted a number of depositions and affidavits, moved for summary judgment, and waived their right to introduce further evidence in the event the motions for summary judgment were denied."

Karcher v. *Daggett*, ____ U.S. at ____, 103 S.Ct. at 2657. So, the *Karcher* hearing did not differ markedly from the usual summary judgment procedure employed here. In neither instance was live testimony received.

In sum, those Supreme Court cases do not compel lower courts to hold superfluous evidentiary hearings. Nevertheless, consistent with *Morris*, they do expect that adequate findings will be made. *See Brown* v. *Thomson*,

____ U.S. at ____, 103 S.Ct. at 2696 ("As the District Court found, this policy [of preserving county boundaries] has particular force given the particular size and population of the State and the nature of its governmental structure."); *Karcher* v. *Daggett*, ____ U.S. at ____, 103 S.Ct. at 2665 ("[T]he District Court's findings easily pass the 'clearly erroneous' test."). Once again, that was done in this case.

Appending a final point to our Issue 1 resolution, it is not obvious what more could have been adduced at a trial, in light of the past, related litigation and plaintiffs' purposeful thoroughness in pressing their claims in the present case. This observation is confirmed by plaintiffs' announced pre-decisional position that there were no disputed, material facts. Differently stated, had it been incumbent to reach plaintiffs' constitutional arguments, this case would still remain in a summary judgment posture—as *all* had agreed. In short, the court views plaintiffs' Issue 1 as too infirm to distinguish this case from *Franklin* v. *Krause*.

b. *Issues 2 and 5: Weighted Voting as Unconstitutional Per Se*

Issues 2 and 5 were included in *Franklin* v. *Krause*'s Question 1 and, also, in the remittitur. *See Franklin* v. *Krause*, 348 N.Y.S.2d at 554 ("[T]here [was] presented, and . . . passed upon . . . whether . . . Local Law [13-1972], because it utilizes weighted voting, is unconstitutional *per se* . . . ") (granting motion to amend the remittitur). The *heart* of both Issues 2 and 5 is the *per se* unconstitutionality of the Board's weighted voting system. That was unmistakably *Franklin* v. *Krause*'s Question 1 and the Supreme Court's dismissal of it is controlling precedent as to Issues 2 and 5. *See Mandel* v. *Bradley*, 432 U.S. at 176. *See also Wright* v. *Lane County*

District Court, 647 F.2d 940, 941 (9th Cir. 1981) (Oregon statute upheld prohibiting the unauthorized practice of law in light of the Supreme Court's dismissal of a "nearly identical" challenge to Arizona's unauthorized practice of law statute); *Government of the Virgin Islands* v. *19.623 Acres of Land*, 536 F.2d 566, 570 (3d Cir. 1976) (rejecting alleged due process denial in a condemnation dispute, in view of controlling effect of Supreme Court's summary affirmance of a lower court, which had rejected the same argument that certain condemnation situations required notice or a hearing); *Sullivan Outdoor Advertising, Inc.* v. *Illinois*, 420 F. Supp. 815, 819 n.4 (N.D. Ill. 1976) ("We have examined the jurisdictional statement . . . and are convinced that the supremacy clause issue was squarely before the [Supreme] Court.")

c. *Issue 4: "Built-in Bias"*

Although phrased as "built-in bias", Issue 4 is the same "majority without a majority vote" objection raised in *Franklin* v. *Krause*'s Questions 2 and 3. Plaintiffs have acknowledged as much.

> "Except for the *Franklin* [v. *Krause*] decision, no Court, Federal or State, has ever allowed a reapportionment plan where a majority of the voters did not have a majority of the vote. This was the fatal flaw in *Franklin* [v. *Mandeville*, 308 N.Y.S.2d 375 (1970)] and is the same 'built-in bias' found in the 1980 plan."

Pl. Br. at 28.[14] *See also* Pl. R. Br. at 7 ("The issue presented to the [Supreme] Court was the 'built-in bias' issue.").

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14 Subsequent to the statement that no court—other than the *Franklin* v. *Krause* courts—had ever approved such a plan, the "majority

The Supreme Court's decision on Questions 2 and 3 continues in force and, as a result, we are "not free to disregard [that] prior pronouncement" as it relates to Issue 4. *See Hicks* v. *Miranda*, 422 U.S. at 344. *See also Cervantes* v. *Guerra*, 651 F.2d 974, 981 (5th Cir. 1981) ("[W]hen the Supreme Court speaks clearly, we are bound to obey."); *Chicago Sheraton Corp.* v. *Zaban*, 593 F.2d 808, 809 (7th Cir. 1979), *cert. dismissed*, 444 U.S. 911 (1979) (The Supreme Court's dismissal of "essentially identical" due process claims involving a tax assessment statute in a related, prior State suit was binding precedent.). *Cf. McKeesport Area School District* v. *Pennsylvania*, 446 U.S. 970, 971-72 (1980) (Concurring in an appeal's dismissal, Justice White stated, "The question presented by the jurisdictional statement . . . is identically phrased. . . . Because a ruling of dismissal for want of a substantial federal question is a judgment on the merits . . . and because this case presents the same challenge to the same statute . . ., the same outcome properly follows . . . .").

c. *Issue 3: The Deviation and Its Mathematical Method*

Issue 3 remains. Plaintiffs assert that the deviation in *Franklin* v. *Krause* was actually 232% (and 132.16% now), based upon the *true* mathematical method.[15] More

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without a majority vote" argument was found wanting in *Greenwald* v. *Board of Supervisors of the County of Sullivan*, 567 F. Supp. at 205-06. There, Judge Edward Weinfeld also rejected an analogous " 'one-third plus one' " objection that "the representatives of more than one-third of the population cannot block the passage of a two-thirds vote." *Id.* at 209. In any event, plaintiffs later acknowledged *Greenwald* in Pl. R. Br. at 16.

15 In relation to the alleged deviations in the present case, Judge Mishler ably summarized plaintiffs' method.

(footnote continued)

particularly, plaintiffs posit that the Supreme Court was unaware of what the announced 7.3% deviation in *Franklin* v. *Krause* really represented and, concomitantly, misunderstood the method used in computing that figure. Thus they contend:

> "A careful review of the plaintiffs' jurisdictional statement submitted to the Supreme Court in *Franklin* v. *Krause* . . . reveals *no* mention of the 232% deviation. The issue presented to the Court was the 'built-in-bias' issue. Whether by coincidence or intentional design, the Board had created a mathematical deviation of 7.3 percentage points in *Franklin* v. *Krause*, which also happened to be roughly equivalent to the 57% figure used to describe the majority population in the Town of Hempstead and the '49% minority voting strength'. Upon information and belief, the United States Supreme Court in a cursory review of the jurisdictional statement may have assumed the '7.3%' figure discussed in *Franklin* v. *Krause* was the difference between 57%

"Plaintiffs claim that the *Franklin* v. *Krause* court omitted an important step from its computation of the range of deviation. They suggest that the degree of under or overrepresentation is not simply the discrepancy between population and voting power, but rather the ratio of that figure to the municipality's population. Plaintiffs then compute the range of deviation by taking the difference between the ratio for the most overrepresented municipality and that for the most underrepresented municipality. Thus, plaintiffs divide the 3.19% discrepancy between the population and voting power of Long Beach, the most overrepresented municipality, by 2.58, Long Beach's percentage of the county population. The resulting figure is 123.64%. Utilizing this analysis, the most underrepresented community is Oyster Bay, with a ratio of 8.52%. The sum of these ratios is 132.16%."

Mem. Dec. at 7-8, App. at 360-61.

> and 49% and found it within the 11.9% holding of *Abate* [v. *Mundt*, 403 U.S. 182, 184, 187 (1971)].

Pl. Br. at 7-8 (emphasis in original).

Plaintiffs' apparent conclusion from these suppositions is that since the true deviation and measure were not in the Jurisdictional Statement, *Franklin* v. *Krause* does not affect Issue 3. *See generally* Pl. R. Br. at 8 ("[T]o be binding as a precedent, there must have been an application of the judicial mind to the precise question . . . ."). Insofar as the purported 232% deviation and mathematical method are not expressly set forth in the "Questions Presented," plaintiffs are right. Beyond that, plaintiffs' argument fails because its suppositions are fallacious.

Plaintiffs' "information and belief" notwithstanding, this court has obtained the complete *Franklin* v. *Krause* record from the Supreme Court.[16] Quite plainly, the deviation and what it measured, as well as the underlying mathematical steps, were front and center, as follows:

> "The number of votes required for passage of a measure requiring a 'majority' vote was fixed at 71, and for a 'two-thirds' measure, at 92. With these mathematical 'givens' . . . the computer then calculated first the number of decisive votes each supervisor may cast . . ., then the respective percentages of voting power . . ., and finally, for comparison purposes, the corresponding percentages of population . . . . Summarized in the 'majority' plan, the *relevant percentages and resulting deviations* are as follows:

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16 The court indicated to counsel at oral argument that it might seek the Supreme Court's record.

	Percentages of Population	*Percentages of Voting Power*	*Deviation*
"Hempstead (Total)	56.2	54.6	−1.6
Oyster Bay	23.1	20.4	−2.7
North Hempstead	16.5	13.0	−3.5
Long Beach	2.3	5.6	+3.3
Glen Cove	1.8	5.6	+3.8

. . . .

"This, then, is the new plan, which produces percentage deviations ranging from −3.5% to +3.8%, or a total numerical range of 7.3%."

Appellee's Br. (Motion to Dismiss) at 10-11, *Franklin* v. *Krause*, 415 U.S. 904 (1974) (emphasis added) (footnotes omitted).[17] *Compare* Sup. Ct. R. 16(1)(b) ("The court will receive a motion to dismiss an appeal from a state court on the ground that it does not present a substantial question . . . .") *and* Sup. Ct. R. 16(6) ("After consideration of the papers distributed pursuant to this rule, the court will enter the appropriate order."), 28 U.S.C. Sup. Ct. Rs. (1977).[18] *See* Comment, "The Precedential Weight

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17 Although not as clearly presented, these figures were likewise contained in the New York Court of Appeals' opinion appended to the Jurisdictional Statement. *See* Appellants' Jur. St., App. A at 4a, *Franklin* v. *Krause*, 415 U.S. 904 (1974). *See also Franklin* v. *Krause*, 344 N.Y.S.2d 885, 887 (1973).

18 Sup. Ct. R. 16 was amended in 1980. As quoted, Sup. Ct. R. 16(1)(b) is unchanged. 28 U.S.C.A. Sup. Ct. Rs. (1977 & 1983 Supp.). Sup. Ct. R. 16(6), however, is now Sup. Ct. R. 16.7, but the quoted language has not been altered. Immediately afterwards, though, is added: "The order may be a summary disposition on the merits." *Id.* Presumably, that new sentence resulted from the Supreme Court's clarifying statements in *Hicks* and *Mandel*.

of a Dismissal by the Supreme Court for Want of a Substantial Federal Question: Some Implications of *Hicks* v. *Miranda*," 76 Col. L. Rev. 508, 532 n.154 (1976) ("Since dismissals are without opinion, a fair determination of the 'reach and content' of a summary dismissal can be had only upon a careful examination of (a) the appellant's jurisdictional statement, (b) the appellee's opposing papers, and (c) the state court's opinion.").

Simply stated, the 7.3% could not have been subject to misinterpretation by the Supreme Court due to a "cursory review," as plaintiffs suggest. Rather, that figure and its computation were put directly to the Supreme Court by the *prevailing* party.

Futhermore, that deviation and method were "fairly comprised" within the "Questions Presented," Sup. Ct. R. 15(1)(c), *supra*, considering the Supreme Court's overriding concern that disparities stay within permissible boundaries.

> "Our decisions [regarding State and local governments] have established . . . that an apportionment plan with a maximum . . . deviation under 10% falls within th[e] category of minor deviations. [Citations omitted.] *A plan with larger disparities . . . creates a prima facie case of discrimination and . . . must be justified . . . .*"

Brown v. *Thomson*, ____ U.S. at ___, 103 S.Ct. at 2696 (emphasis added).

Indeed, the question of deviation from the one person, one vote rule is fundamental in reapportionment litigation. The Supreme Court made this plain in *Reynolds* v. *Sims*, 377 U.S. 533, 567 (1964).

> "Population is . . . the *starting point* for consideration and the *controlling criterion* for judgment in legislative apportionment controversies."

(emphasis added) (footnote omitted). *See also Abate* v. *Mundt*, 403 U.S. 182, 185 (1971) ("[E]lectoral apportionment must be based on the general principle of population equality. . . . [T]his Court has carefully scrutinized state interests offered to justify deviations from population equality."); L. Tribe, American Constitutional Law 743 (1978) ("Even where the one person, one vote principle governs, it remains to be determined how far from precise mathematical equality an apportionment scheme may stray before it violates the Constitution."). *Cf. Andrews* v. *Koch*, 528 F. Supp. 246, 252 (1981), *aff'd*, 688 F.2d 815 (2d Cir. 1982), *aff'd sub nom. Giacobbe* v. *Andrews*, ____ U.S. ____, 103 S.Ct. 32 (1982) ("[T]he question is whether the allocation of an equal number of at-large Council seats to each of the five boroughs, without regard to substantial . . . disparities, comports with the constitutional rule of substantial numerical equality. . . ."). [19]

Given that essentiality in reapportionment litigation of deviation from the one person, one vote rule, the court finds that the 7.3% variance and its computation were at the least "fairly comprised" within the "Questions Presented" in *Franklin* v. *Krause*. Sup. Ct. R. 15(1)(c), *supra*. From that finding, we necessarily conclude that that disparity and its manifest calculation were considered

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19 *Brown* v. *Thomson*, ____ U.S. at ____, 103 S.Ct. at 2698 & n.8, is perhaps the best illustration of what must be *affirmatively* done to preclude the Supreme Court from evaluating the deviation from the one person, one vote rule, given its importance in reapportionment controversies. But even in that presumably unusual situation, the extent of the deviation still received troubled comments from members of the majority.

by the Supreme Court and determined to be insubstantial—as were the other questions expressly raised in the Jurisdictional Statement. The "reach and content" of *Franklin* v. *Krause*, thereby, extends to Issue 3. *Hicks* v. *Miranda*, 422 U.S. at 345 n.14. *See generally Prettyman* v. *Nebraska*, 537 F. Supp. 712, 715 (D. Neb. 1982) (A prior Supreme Court dismissal of a State court decision upholding the constitutionality of Nebraska's education statutes and regulations was binding in a subsequent action involving different parties but the same "issues and arguments."); *Bangor Baptist Church* v. *Maine*, 549 F. Supp. 1208, 1219 (D. Maine 1982) ("A summary disposition has precedential value in cases virtually indistinguishable from the case summarily disposed of . . . and in cases involving . . . slightly different facts and issues . . . .").

Before concluding this deviation and mathematics discussion, however, plaintiffs have advanced another, related argument concerning Issue 3. Although not fully developed, their contention is that the Supreme Court could not have appreciated the method before it, since the simple computation used was applicable to single-member district plans—not a complex weighted voting system. *See Brown* v. *Thomson*, ____ U.S. at ____, 103 S.Ct. at 2701 ("We have come to establish a rough threshold of 10% maximum deviation . . . (adding together the deviations from average district size of the most underrepresented and most overrepresented districts) . . . .") (Brennan, J., dissenting). *See, e.g.*, *White* v. *Weiser*, 412 U.S. 783, 785 (1973) ("The 13th District exceeded the ideal . . . by 2.43% and the 15th District was smaller by 1.7%. [T]heir total percentage deviation was 4.13%.").

In plaintiffs' view, the Supreme Court obviously made a mistake, since *Franklin* v. *Krause* assertedly does not

comport with other reapportionment caselaw. Accordingly, that summary adjudication was an "aberration" and, of necessity, nonbinding. *See* Pl. R. Br. at 7 ("[T]he Supreme Court decision was based on the same mistake . . . that was before the New York . . . Court of Appeals. Thus, . . . the *Franklin* v. *Krause* holding is such an aberration from all other Supreme Court holdings that it cannot be relied upon.").

There are two responses. First, the short answer is that, as shown, the Supreme Court knew that a weighted voting system was being measured and by what method.

Second, applying that simple method to the Board's weighted voting system was in accord with the Supreme Court's reapportionment jurisprudence then and more so now. Early in its journey through the "political thicket," the Supreme Court recognized that *flexibility*—not precise mathematical tests—was required when reviewing State and local government representation plans.

> "[T]he problem does not lend itself to any such uniform formula, and it is neither practicable nor desirable to establish rigid mathematical standards for evaluating . . . a state legislative apportionment scheme . . . ."

Roman v. *Sincock*, 377 U.S. 695, 710 (1964). *See generally Reynolds* v. *Sims*, 377 U.S. at 577 ("Mathematical exactness or precision is hardly a workable constitutional requirement.") (footnote omitted); *Avery* v. *Midland*, 390 U.S. 474, 485 (1968) ("The Constitution does not require that a uniform straitjacket bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems.").

That early recognition has evolved into a consistent theme.

> "Neither courts nor legislatures are furnished any specialized calipers that enable them to extract from the general language of the Equal Protection Clause . . . the mathematical formula that establishes what range of percentage deviations is permissible, and what is not."

Mahan v. *Howell*, 410 U.S. 315, 329 (1973). *See also Gaffney* v. *Cummings*, 412 U.S. 735, 749 (1973) ("An unrealistic overemphasis on raw population figures, a mere nose count . . . may submerge . . . other considerations and . . . furnish a ready tool for ignoring factors that in day-to-day operation are importnat to an acceptable . . . apportionment . . . ."); *Karcher* v. *Daggett*, ____ U.S. at ____, 103 S.Ct. at 2659 ("[W]e have required that absolute population equality be the paramount objective . . . *only* in . . . congressional districts . . . .") (emphasis added). *Cf. Morris* v. *Board of Estimate*, 707 F.2d at 691 ("So long as the requirements of the Equal Protection Clause are met, each locality is free to develop the system of governance which best accords with its needs."); *Greenwald* v. *Board of Supervisors of County of Sullivan*, 567 F. Supp. at 210 ("These matters cannot be determined with mathematical exactitude or the fine balance of an apothecary's scale. The flexibility which is to be afforded municipal government schemes has been repeatedly stressed . . . .") (footnote omitted).

Thus, while deviation from the ideal is a fundamental inquiry in reapportionment disputes, the Supreme Court's review of State and local government legislative plans has been noteworthy for the *nonpromulgation* of strict mathematical tests. Rather, the theme—especially concerning units of local government—has been flexibility. Based upon that theme, we conclude that the Supreme

Court was not only aware of the simple mathematical method used in *Franklin* v. *Krause*, but deemed that measure to comport with the flexibility desirable when examining a local government plan.

Therefore, despite plaintiffs' intemperate categorization of the Supreme Court's decision in *Franklin* v. *Krause* as a nonbinding "aberration," this court believes the contrary. *Franklin* v. *Krause* is both binding and aligned with the Supreme Court's reapportionment jurisprudence. As such, *Franklin* v. *Krause* resolves Issue 3. *Mandel* v. *Bradley*, 432 U.S. at 176.

Besides Issue 3, *Franklin* v. *Krause*, as discussed, resolves Issues 2, 4 and 5, also. In so holding, we are heeding the Supreme Court's instructions, while adhering to the guidance of our prior decisions.

> "The District Court should have followed the Second Circuit's advice, first, in *Port Authority Bondholders Protective Committee* v. *Port of New York Authority*, 387 F.2d 259, 263 n.3 (1967), that 'unless and until the Supreme Court should instruct otherwise, inferior federal courts had best adhere to the view that if the Court has branded a question as unsubstantial, it remains so except when doctrinal developments indicate otherwise'; and, later, in *Doe* v. *Hodgson*, 478 F.2d 537, 539, *cert. denied sub nom. Doe* v. *Brennan*, 414 U.S. 1096 (1973), that the lower courts are bound by summary decisions by this Court ' "until such time as the Court informs [them] that [they] are not.' "

Hicks v. *Miranda*, 422 U.S. at 345-46 (brackets by *Hicks* Court). The Supreme Court has not informed us otherwise—either directly or by doctrinal development. Instead, as noted, the Supreme Court's jurisprudence

since *Franklin* v. *Krause* has continued to underscore the latitude afforded State and local governments. *See*, *e.g.*, *Brown* v. *Thomson*, ____ U.S. at ____, 103 S.Ct. at 2698-99. Accordingly, we remain bound by *Franklin* v. *Krause*'s "reach and content." *Hicks* v. *Miranda*, 422 U.S. at 344-45 & n.14.

That result is especially appropriate in this case. As defendants pointedly remark, plaintiffs are attacking "the *same* legislative body in the *same* county using the *same* system of allocating votes." Def. Br. at 21 (emphasis in original). There can be no disagreement with that description. Differences between the two suits are too inadequate to preclude *Franklin* v. *Krause*'s precedential effect. In other words, even if no further, *Franklin* v. *Krause* extends to this case. *See Preston* v. *Seay*, 684 F.2d 172, 173 (1st Cir. 1982) (In rejecting a constitutional challenge to a jury trial waiver statute, the court grounded its decision on two prior Supreme Court dismissals of factually different cases attacking the same statute and commented, "It is . . . often difficult to understand the proper reach of . . . [summary adjudications] . . . but . . . the precedents here are so close as to be dispositive."). *Cf. Barry* v. *City of New York*, 712 F.2d 1554, 1558 (2d Cir. 1983), *cert. denied*, 104 S.Ct. 548 (1983) ("We note that the Supreme Court has dismissed for lack of a substantial federal question three appeals from State decisions upholding financial disclosure laws. . . . [T]he statute challenged in this case, and the issues raised differ in important respects . . . .").

CONCLUSION

Based upon the preceding analysis, we hold that except for Issue 1, which lacks merit, *Franklin* v. *Krause*'s

"reach and content" controls this suit. *Hicks* v. *Miranda*, 422 U.S. at 345 n.14. To hold otherwise would mean that *Franklin* v. *Krause* "for practical purposes, [has] no force as precedent." *Hawaiian Telephone Co.* v. *Hawaii*, 614 F.2d 1197, 1200 (9th Cir. 1980), *cert. denied*, 446 U.S. 984 (1980).

While plaintiffs may desire *Franklin* v. *Krause*'s relitigation, we cannot disregard such prior authority. To do so would not only be evading responsibility but fostering causeless litigation, recurring with each census.

For the foregoing reasons, we affirm the district court's grant of summary judgment and dismissal of the complaint.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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THE LEAGUE OF WOMEN VOTERS OF NASSAU COUNTY, CAROL CARLTON, JUDITH SCHMERTZ, BARBARA JOSEPHER, ADELE FOX AND ANN BORNER.

CV 82-1607

Plaintiffs,

-against-

NASSAU COUNTY BOARD OF SUPERVISORS, THOMAS GULOTTA, as Presiding Supervisor of Town of Hempstead, JAMES BENNETT, as Supervisor of Town of Hempstead, JOHN KIERNAN, as Supervisor of Town of North Hempstead, HANNAH KOMANOFF, as Supervisor of City of Long Beach, JOSEPH COLBY, as Supervisor of the Town of Oyster Bay, ALAN PARENTE, as Mayor-Supervisor of City of Glen Cove, ISABEL DODD and M.PATRICIA MOORE, as Commissioner of the Board of Elections for Nassau County,

May 18, 1983

Defendants.

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MISHLER, District Judge

This action brought by registered voters of Nassau County and the League of Women Voters of Nassau County seeks a declaratory judgment that Nassau County Local Law 2-1982, which amended Section 104(5) of the Nassau County Government Law, is unconstitutional in that it violates the Equal Protection Clause of the Fourteenth Amendment. The defendants' answer in addition to generally denying the material allegations of the complaint, asserts the affirmative defense of "res judicata and/or stare decisis," based on Franklin v. Krause, 32 N.Y.2d 234, 344 N.Y.S.2d 885 (1973). Both sides move for summary judgment.

The material facts are not in dispute:

Nassau County consists of five (5) municipalities: three (3) towns - Hempstead, Oyster Bay, and North

Hempstead, and two (2) cities: Long Beach and Glen Cove. The Nassau County Board of Supervisors ("Board of Supervisors") consists of six (6) members: the presiding supervisor and supervisor of Hempstead, and the supervisor of each of the other towns and cities.

The prior version of Section 104(5), effective since January 1, 1976, was based on the 1970 federal census (sic). It provided for a weighted voting plan under which the total number of votes to be cast by the board of supervisors [sic] was fixed at 130. The distribution of population, number of votes, and voting power under Section 104(5) is as follows:

Municipality	Population	Percent of Population	No. of Votes	Percent Voting Power
Hempstead	801,592	56.2	* 70	54.6
Oyster Bay	333,342	23.1	32	20.4
No. Hempstead	235,007	16.5	23	13.0
Long Beach	33,127	2.3	3	5.6
Glen Gove	25,770	1.8	2	5.6
TOTAL	1,428,838			

* The presiding supervisor of Hempstead and the supervisor of Hempstead each had 35 votes. A simple majority was defined as requiring 71 votes. A two-thirds majority was defined as requiring 92 votes.

Under sub-paragraph 3 of Section 104, the Board of Supervisors was required to amend subdivision 5 "not later than six months after the publication of the results of each federal decennial census . . . [to] propose a reapportionment of the voting power of the members of the board of supervisors."

Section 104(4)(h) provides that "[i]n preparing each reapportionment, the board of supervisors shall employ an independent computerized mathematical analysis and such other method or methods as shall most nearly equalize the percentage of voting power of each town and city to its percentage of the total county population." Upon publication of the 1980 census [sic], the Board of Supervisors hired Lee Papayanopoulos as an expert to prepare a mathematical voting power analysis in connection with the 1980 census [sic] results.

On March 8, 1982, the Board of Supervisors unanimously adopted Local Law 2-1982, amending Section 104(5). The amendment provides for a total of 108 votes, with a majority vote consisting of 65 votes. The revised table of population, votes and voting power is as follows:

Municipality	Population	Percent of Population	No. of Votes	Percent Voting Power
Hempstead	738,517	55.92	* 58	53.85
Oyster Bay	305,750	23.12	22	21.15
No. Hempstead	218,624	16.53	15	17.31
Long Beach	34,073	2.58	7	5.77
Glen Gove	24,618	1.86	6	1.92
TOTAL	1,321,582			

* The presiding supervisor is assigned 30 votes; the supervisor is assigned 28 votes.

DISCUSSION

In Franklin v. Krause, 32 N.Y.2d 234, 237, 344 N.Y.S.2d 885, 887, reargument denied, motion to amend remittitur granted, 33 N.Y.2d 646, 348 N.Y.S.2d 554 (1973), appeal dismissed for want of a substantial federal question, 415 U.S. 904, 94 S. Ct. 1397 (1974), the New York Court of Appeals upheld the constitutionality of the prior version of Section 104(5).[1] The court noted that "the smaller communities are superenfranchised to a somewhat greater extent than the larger communities are disenfranchised. But the range of deviation is only 7.3% and the plan fits comfortably within the intendment of Iannucci v. Board of Supervisors of County of Washington . . . . [sic] 32 N.Y.2d at 237, 344 N.Y.S.2d at 887.

Plaintiffs concede that the range of deviation under current section

[sic] 104(5) is smaller than the 7.3% range of deviation which was approved in Franklin v. Krause, supra. However, plaintiffs argue that the court in Franklin v. Krause, erred in the method it used to compute the range of deviation. Specifically, plaintiffs' position is that in Franklin v. Krause, supra, defendants' counsel used "a new mathematical symbol, a percentage point deviation to which he added a % sign. Thus, came the infamous adding of 3.5% plus 3.8% coming up with a numerical value of 7.3% . . . . No where [sic] in his memorandum of law is the correct 232% percentage deviation mentioned." Plaintiffs maintain that "the United States Supreme Court [in dismissing for want of a substantial federal question] did not knowingly approve a 232% deviation in a local legislative body which grossly exceeded any other

permissible percentage deviation." (Aff. Charles Roberts).

In Franklin v. Krause, the court computed the number of percentage points by which each municipality's population exceeded or fell short of its percentage of voting power. Using these figures, the court computed the range of deviation by adding the excess of voting power over population for the most overrepresented municipality to the excess of population over voting power for the most underrepresented municipality. Since Glen Cove, the most overrepresented municipality, had 3.8% more voting power than population and North Hempstead, the most underrepresented municipality, had 3.5% less voting power than population, the range of deviation was the sum of those figures, 7.3%. Applying this approach to the voting plan at issue here, the resulting range of deviation is 6.15% or 5.26%, depending on whether the

voting power of the presiding supervisor and supervisor of Hempstead is combined or considered separately. This is reflected in the following table:

(See Page B-12)

Plaintiffs claim that the Franklin v. Krause court omitted an important step from its computation of the range of deviation. They suggest that the degree of under or overrepresentation is not simply the discrepancy between population and voting power, but rather the ratio of that figure to the municipality's population. Plaintiffs then compute the range of deviation by taking the difference between the ratio for the most

Municipality	% of Population	% of Voting Power	Deviation
Presiding Supervisor Hempstead	27.96	28.85	+ .89
Supervisor Hempstead	27.96	25.00	-2.96
Total	55.92	53.85	-2.07*
Oyster Bay	23.12	21.15	-1.97
North Hempstead	16.53	17.31	+ .78
Long Beach	2.58	5.77	+3.19**
Glen Cove	1.86	1.92	+ .06

* Most underrepresented.
** Most overrepresented.
Range of Deviation: 2.07 + 3.19 = 5.26%

overrepresented municipality and that for the most underrepresented municipality. Thus, plaintiffs divide the 3.19% discrepancy between the population and voting power of Long Beach, the most overrepresented municipality, by 2.58, Long Beach's percentage of the county population. The resulting figures is 123.64%. Utilizing this analysis, the most underpresented community is Oyster Bay, with a ratio of 8.52%. The sum of these ratios is 132.16%.

According to plaintiffs, their approach is the proper mathematic method for testing a weighted voting plan under Reynolds v. Sims, 377 U.S. 533, 84 S. Ct. 1362, rehearing denied, 379 U.S. 870, 85 S. Ct. 12 (1964). We find no such suggestion in Reynolds. In Reynolds, the Court found that the existing and proposed apportionment plans for the bicameral Alabama state legislature were unconstitutional under the Equal

Protection Clause of the Fourteenth Amendment. The violation in Reynolds was the failure to make population the controlling factor in apportioning the legislature. "[T]he deviations from a strict population basis are too egregious to permit us to find that body under this proposed plan, was apportioned sufficiently on a population basis so as to permit the arrangement to be constitutionally sustained." Id. at 569, 84 S. Ct. at 1385.

However, the Reynolds Court was concerned not only with the proportionality of voting power to population, but also with the relative strength of voting power among the districts in the county. Thus, the Court noted that

> [a]lthough about 43% of the State's total population would be required to comprise districts which would elect a majority in the Senate, only 39 of the 106 House seats were actually to be distributed on a

> population basis, as each of Alabama's 67 counties was given at least one representative, and population variance ratios of close to 5-to-1 would have existed. While mathematical nicety is not a constitutional requisite, one could hardly conclude that the Alabama House, under the proposed constitutional amendment, had been apportioned sufficiently under the requirements of the Equal Protection Clause.

Id.

Under Local Law 2-1982, population is the controlling though perhaps not the only factor in the apportioning of weighted votes among the municipalities in Nassau County. Moreover, the relative voting strength of the municipalities parallels their relative populations. The Constitution does not require more. The County acted properly in permitting some variance from ideal population to voting power ratios in order to preserve existing subdivision lines and the existing legislative structure. The Supreme Court has recognized that local governments face

greater difficulty in achieving equal legislative representation than do their state and local counterparts and thus must be given greater leeway in devising apportionment plans. In Abate v. Mundt, 403 U.S. 182, 184-86, 91 S. Ct. 1904, 1906-07 (1971), the Court said:

> It is well established that electoral apportionment must be based on the general principle of population equality and that this principle applies to state and local elections, Avery v. Midland County, 390 U.S. 474, 481, 88 S. Ct. 1114, 1118, 20 L.Ed.2d 45 (1968). 'Mathematical exactness or precision is hardly a workable constitutional requirement,' Reynolds v. Sims, 377 U.S. 533, 577, 84 S. Ct. 1362, 1389, 1390, 12 L.Ed.2d 506 (1964), but deviations from population equality must be justified by legitimate state considerations, Swann v. Adams, 385 U.S. 440, 444, 87 S. Ct. 569, 572, 17 L.Ed.2d 501 (1967). Because voting rights require highly sensitive safeguards, this Court has carefully scrutinized state interests offered to justify deviations from population equality.
>
> In assessing the constitutionality of various apportionment plans, we have

observed that viable local governments may need considerable flexibility in municipal arrangements if they are to meet changing societal needs, Sailors v. Board of Education of Kent County, 387 U.S. 105, 110-111, 87 S. Ct. 1549, 1553-54, 18 L.Ed.2d 650 (1967), and that a desire to preserve the integrity of political subdivisions may justify an apportionment plan which departs from numerical equality. Reynolds v. Sims, supra, 377 U.S., at 578, 84 S. Ct. at 1390. These observations, along with the facts that local legislative bodies frequently have fewer representatives than do their state and national counterparts and that some local legislative districts may have a much smaller population than do congressional and state legislative districts, lend support to the argument that slightly greater percentage deviations may be tolerable for local government apportionment schemes, cf. ibid. Of course, this Court has never suggested that certain geographic areas or political interests are entitled to disproportionate representation. Rather, our statements have reflected the view that the particular circumstances and needs of a local community as a whole may sometimes justify departures from strict equality.

> Accordingly, we have underscored the danger of apportionment structures that contain a built-in bias tending to favor particular georgraphic areas or political interests or which necessarily will tend to favor, for example less populous districts over their more highly populated neighbors, see Hadley v. Junior College District, 397 U.S. 50, 57-58, 90 S. Ct. 791, 795-796, 25 L.Ed.2d 45 (1970). In this case, we have no such indigenous bias; there is no suggestion that the Rockland County plan was designed to favor particular groups. It is true that the existence of any deviations from strict equality means that certain districts are advantaged at that point in time; but, under this plan, changing demographic patterns may shift electoral advantages from one town to another.

We find that the plan for the apportionment of votes on the Nassau County Board of Supervisors, contained in Local Law 2-1982, is an adequate compromise between the constitutional one man, one vote requirement and the County's interest in preserving existing subdivision lines and the existing legislative structure.

Plaintiffs challenge a second aspect of Local Law 2-1982. They argue that by artificially fixing 65 out of 108 votes as a majority, Hempstead is prevented from exercising voting power proportional to its population. Plaintiffs contend that since Hempstead contains more than half of the County's population, it is entitled to a majority voice on the Board of Supervisors. Plaintiffs cite Franklin v. Mandeville, 26 N.Y.2d 65, 308 N.Y.S.2d 375 (1970), in which the New York Court of Appeals rejected the weighted voting plan which had previously governed the Nassau County Board of Supervisors on the ground that Hempstead, although representing 57.12% of the County's population, could only cast 49.6% of the Board's vote. However, the court in Franklin v. Mandeville overlooked the prior decision of the New York Court of Appeals in Iannucci v. Board of Supervisors, 20 N.Y.2d 244, 282

N.Y.S.2d 502 (1967). In Iannucci, the court invalidated a weighted voting plan which gave a majority voice to a legislator who represented a majority of the population. The court reasoned that with respect to measures requiring a simple majority for passage or defeat, more than 50% of the votes would be equivalent to 100% of the voting power.[2] The court held that the ability to affect the passage or defeat of legislation, rather than the number of votes, was the proper measure of voting power. Thus, "[i]n order to measure the mathematical voting power of each member of these county boards of supervisors and compare it with the proportion of the population which he represents, it would be necessary to have the opinions of experts based on computer analyses." Id. at 252-53, 282 N.Y.S.2d at 508-09.

In Franklin v. Krause, supra, the New York Court of Appeals

acknowledged the tension between Franklin v. Mandeville and Iannucci v. Board of Supervisors. In approving the voting plan, notwithstanding the artificial majority which blocked Hempstead from exercising the determinative vote, the court stated:

> The plan before us comports with the standards set forth in Iannucci v. Board of Supervisors of County of Washington (20 N.Y.2d 244, 282 N.Y.S.2d 502, 229 N.E.2d 195, supra) as closely as is possible, given the unique situation created by Hempstead's size with the disparities in population among the other units. The fact that the plan still carries the problem found decisive in Franklin v. Mandeville (26 N.Y.2d 65, 308 N.Y.S.2d 375, 256 N.E.2d 534, supra) should not constitute a continuing bar to validation. It has been demonstrated that the standards applied to our former decision have been very significantly altered. The more thought that was given to the local situations, the more it became apparent it was more desirable to preserve traditional unit representation even if that led to a slight degree of disparity in voting power. The integration of local taxing and local services depends on

> preservation of unit boundary lines and unit representation. To merge these units into one another for the sake of creating mathematically equal districts would be to sacrifice practicality for an abstraction; a situation which surely was never contemplated or briefed in Reynolds v. Sims (377 U.S. 533, 84 S. Ct. 1362, 12 L.Ed.2d 506, supra). Representation at the State and congressional levels can be arranged on a more precise mathematcial [sic] basis because the responsibilities of the representatives are not so specifically tied to the management of local affairs.
>
> The plan before us has been "computerized" as suggested by the Iannucci requirement and moves close to one man, one vote without granting Hempstead 100% voting power.

32 N.Y.2d at 241-42, 344 N.Y.S.2d at 891. Similarly, the revised voting plan, incorporating 1980 Census [sic] results, moves close to one man, one vote without superenfranchising Hempstead by giving it effective control over the Board. Complete mathematical perfection is not required.

We find that Local Law 2-1982 does not offend either the Equal Protection or Due Process Clause of the Fourteenth Amendment and contains a constitutionally permissible plan for the apportionment of votes on the Nassau County Board of Supervisors. See Franklin v. Krause, supra; Bechtle v. Board of Supervisors of the County of Nassau, 81 A.D.2d 510, 44 N.Y.S.2d 403 (2d Dep't), aff'd mem., 54 N.Y.2d 674, 442 N.Y.S.2d 509 (1981).

Defendants' motion for summary judgment is granted. Plaintiffs' motion for summary judgment is denied, and it is

SO ORDERED.

The Clerk of the Court is directed to enter judgment against the plaintiffs, and for the defendants, dismissing the complaint.

_____

U.S.D.J.

FOOTNOTES

1. In granting the motion to amend the remittitur the New York Court of Appeals held:

> Upon the appeal herein there were presented and necessarily passed upon, questions arising under the Constitution of the United States, viz: (1) Whether Local Law No. 13-1972 of Nassau County is unconstitutional because it deprives plaintiffs of the equal protection of the laws as well as due process of law under the Fourteenth Amendment to the Constitution of the United States; and (2) whether said Local Law, because it utilizes weighted voting is unconstitutional per se . . . . The Court of Appeals held there was no violation of any of plaintiffs' constitutional rights.

33 N.Y.2d at 646, 348 N.Y.S.2d at 554.

3. [sic]
The court said in Iannucci:

> The principle of one man-one vote is violated, however, when the power of a representative to affect the passage of legislation by his vote, rather than the influencing his colleagues, does not roughly correspond to the proportion of the population in his constituency. Thus for example, a particular weighted voting plan would be invalid if 60% of the population was entitled to

Footnote Continued

3. [sic]
Footnote Continued From Previous Page

cast 60% of the votes. Although his vote would apparently be weighted only in proportion to the population he represented, he would actually possess 100% of the voting power whenever a simple majority was all that was necessary to enact legislation.

20 N.Y.2d at 252, 282 N.Y.S.2d at 508.

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NASSAU COUNTY GOVERNMENT LAW

§ 104. Members; votes

1. The supervisor or supervisors of each of the towns or cities in the county sitting together shall constitute the county board of supervisors; provided that no city incorporated after this act shall have taken effect shall elect a supervisor thereof, but such city shall continue, for the purpose of electing supervisors, to be a part of the town or towns from which such city was erected. The number of supervisors to be elected in each town and city in the county shall remain as at present provided by law.

2. The supervisor or supervisors of each town and city shall be entitled to cast at meetings of the board of supervisors the number of votes to be determined and fixed in accordance with the provisions of this section.

3. In accordance with the standards set forth in subdivision four of this section, the board of supervisors shall, not later than six months after the publication of the results of each federal decennial census by appropriate amendment to subdivision five of this section, propose a reapportionment of the voting power of the members of the board of supervisors.

4. In determining and fixing the total number of votes, the distribution of votes among the supervisors, and the number of votes needed to pass particular measures, the board of supervisors shall as closely as possible apply and conform to the following standards:

a. There shall be a modified weighted voting system.

b. The total number of votes of all supervisors shall be no less than six, and shall not exceed the county's total population.

c. No fractional votes shall be used or recognized.

d. The total number of votes which each supervisor is entitled to cast shall not be divided and shall be cast as one unit.

e. The voting power of a supervisor shall be measured by the mathematical possibility of his casting a decisive vote on a particular matter.

f. The voting power of a town or city shall be deemed equal to the voting power of its supervisor except that voting power of the town of Hempstead shall be deemed equal to the total voting power of its two supervisors.

g. The percentage of voting power of each town and city shall be greater than zero and shall approximate the town's or city's percentage of the total county population.

h. In preparing each reapportionment, the board of supervisors shall employ an independent computerized mathematical analysis and such other method or methods as shall most nearly equalize the percentage of voting power of each town and city to its percentage of the total county population.

ADOPTED AS
LOCAL LAW NO. 2-1982
KNOWN AS LOCAL LAW NO. 8-1982
FOR PURPOSES OF FILING WITH
SECRETARY OF STATE

A LOCAL LAW to amend the County Government Law of Nassau County in relation to the voting power of the Board of Supervisors.

(Adopted by the Board of Supervisors on March 8, 1982 and signed by the County Executive on March 8, 1982; subject to approval by a referendum of the voters of the County of Nassau on a date to be fixed by resolution of the Board of Supervisors)

BE IT ENACTED by the Board of Supervisors of the County of Nassau as follows:

Section 1. Subdivision five of section one hundred four of the County Government Law of Nassau County is hereby repealed and a new subdivision, to be subidivision five, is inserted therein to read as follows:

5. Based on the nineteen hundred eighty federal census, the number of votes in each of the following categories is hereby determined and fixed as follows:

a) For matters requiring a majority of the voting strength of the board of supervisors or a majority of the voting power of the board of supervisors:

(1) Total number of votes	108
(2) Distribution of votes	
Presiding Supervisor of Hempstead	30
Supervisor of Hempstead	28
Supervisor of Oyster Bay	22
Supervisor of North Hempstead	15
Supervisor of Long Beach	7
Supervisor of Glen Cove	6
(3) Votes required for passage	65

b) For matters requiring a two-thirds vote of the voting strength of the board of supervisors or two-thirds of the total voting power of the board of supervisors

(1)	Total number of votes	108
(2)	Distribution of votes	
	Presiding Supervisor of Hempstead	30
	Supervisor of Hempstead	28
	Supervisor of Oyster Bay	22
	Supervisor of North Hempstead	15
	Supervisor of Long Beach	7
	Supervisor of Glen Cove	6
(3)	Votes required for passage	72

Section 2. This local law shall not be effective until approved by a referendum of the voters of the county of Nassau,

tne date for which shall be fixed by a resolution of the board of supervisors, such date not to be less than sixty days after the final adoption of this local law by the Board of Supervisors.

APPROVED: MARCH 8, 1982

/s/ FRANCIS T. PURCELL

County Executive

VOTING ANALYSIS FOR ROCKLAND COUNTY,

REQUIRED FOR PASSAGE: 204 VOTES.

	A TOWN	B POPUL-ATION	C VOTE
1.	ORANGETOWN	12153	19
2.	"	12153	19
3.	"	12153	19
4.	"	12153	19
5.	RAMAPO	12722	20
6.	"	12723	20
7.	"	12723	20
8.	"	12723	20
9.	"	12723	20
10.	"	12723	20
11.	"	12723	20
12.	STONY POINT	12838	20
13.	CLARKSTOWN	12848	20
14.	"	12848	20
15.	"	12848	20
16.	"	12849	20
17.	"	12849	20
18.	"	12849	20
19.	HAVERSTRAW	15964	25
20.	"	15965	25
TOTALS		259530	406

LARGEST DISCREPANCIES 19.79 AND

PROPO
NTER TOTAL VOTE
4000

N.Y. ROCKLAND-81- 406.50

S I M P L E MAJORITY PLAN.

D # DECISIVE COMBINATIONS	E % VOTE	F VOTING POWER	G % POPULATION	H DISCREPANCY
71500.	4.68	3.87	4.68	-17.36
71500.	4.68	3.87	4.68	-17.36
71500.	4.68	3.87	4.68	-17.36
71500.	4.68	3.87	4.68	-17.36
92092.	4.93	4.98	4.90	1.68
92092.	4.93	4.98	4.90	1.68
92092.	4.93	4.98	4.90	1.68
92092.	4.93	4.98	4.90	1.68
92092.	4.93	4.98	4.90	1.68
92092.	4.93	4.98	4.90	1.68
92092.	4.93	4.98	4.90	1.68
92092.	4.93	4.98	4.95	0.77
92092.	4.93	4.98	4.95	0.69
92092.	4.93	4.98	4.95	0.69
92092.	4.93	4.98	4.95	0.69
92092.	4.93	4.98	4.95	0.68
92092.	4.93	4.98	4.95	0.68
92092.	4.93	4.98	4.95	0.68
136136.	6.16	7.37	6.15	19.79
136136.	6.16	7.37	6.15	19.78
1847560.	100.00	100.00	100.00	
-17.36				2204

1 ANALYSIS OF VOTING POWER UNDER

THIS IS A 71 VOTE MAJORITY PLAN.

A TOWN	B POPUL-ATION	C VOTE
1.HEMPSTEAD X	40034	35
2.HEMPSTEAD Y	40034	35
3.OYSTER BAY	32914	32
4.NO.HEMPSTEAD	23418	23
5.LONG BEACH	3312	3
6.GLEN COVE	2577	2
TOTALS	142289	130

* PERCENTAGE RATIO OF COLUMN B
** PERCENTAGE RATIO OF COLUMN C
*** PERCENTAGE RATIO OF COLUMN D

BEST AVAILAB

WEIGHTED VOTING FOR NASSAU COUNTY, N

ID: NASSAU-72-20

D # DECISIVE COMBINATIONS	E ** % VOTE	F *** VOTING POWER	G * % POPULATION
15.0	26.923	27.778	28.136
15.0	26.923	27.778	28.136
11.0	24.615	20.370	23.132
7.0	17.692	12.963	16.458
3.0	2.308	5.556	2.325
3.0	1.538	5.556	1.811
54.0	100.000	100.000	100.000

TO SUM OF COLUMN B.
TO SUM OF COLUMN C.
TO SUM OF COLUMN D.

BLE COPY

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SPECIAL WEIGHTED VOTING ANALYSIS* FOR NASSAU COUNTY, NY NASSAU-82- 108.60

* ABSOLUTE DEVIATION COMPUTED ACCORDING TO FRANKLIN v. KRAUSE

REQUIRED FOR PASSAGE: 65 VOTES. ** THREE-FIFTHS MAJORITY PLAN.

A TOWN	B POPULATION	C VOTE	D # DECISIVE COMBINATIONS	E % VOTE	F VOTING POWER	G % POPULATION	ABSOLUTE DEVIATION*
1.HEMPSTEAD	36976	30	15.	27.78	28.85	27.96	
2.HEMPSTEAD	36976	28	13.	25.93	25.00	27.96	-1.03
3.OYSTER BAY	30575	22	11.	20.37	21.15	23.12	-1.96
4.NO HEMPSTEAD	21862	15	9.	13.89	17.31	16.53	0.78
5.LONG BEACH	3407	7	3.	6.48	5.77	2.58	3.19
6.GLEN COVE	2462	6	1.	5.56	1.92	1.86	0.06
TOTALS	132258	108	52.	100.00	100.00	100.00	

MAXIMUM DEVIATIONS 3.19 AND -1.96

G-1

Office-Supreme Court, U.S.
FILED
NOV 21 1984
ALEXANDER L. STEVAS,
CLERK

NO. 84-670

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JUDITH SCHMERTZ and BARBARA JOSEPHER,

Petitioners,

v.

NASSAU COUNTY BOARD OF SUPERVISORS, THOMAS GULOTTA, as Presiding Supervisor of Town of Hempstead, JAMES BENNETT, as Supervisor of Town of Hempstead, JOHN KIERNAN, as Supervisior of Town of North Hempstead, HANNAH KOMANOFF, as Supervisor of City of Long Beach, JOSEPH COLBY, as Supervisor of the Town of Oyster Bay, and VINCENT A. SUOZZI, as Mayor-Supervisor of City of Glen Cove,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented

Whether, as the court below held, plaintiffs' claim that the 1980 census-based reapportionment of voting power among members of the defendant Board is excessively disproportionate to the population represented by certain members is foreclosed by this Court's summary dismissal of an appeal from the judgment in a prior state court action holding constitutional the same Board's use of the same weighted voting system, with a substantially greater deviation, under an apportionment based on the 1970 census?

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NO. 84-670

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JUDITH SCHMERTZ and BARBARA JOSEPHER,

Petitioners,

v.

NASSAU COUNTY BOARD OF SUPERVISORS, THOMAS GULOTTA, as Presiding Supervisor of Town of Hempstead, JAMES BENNETT, as Supervisor of Town of Hempstead. JOHN KIERNAN, as Supervisor of Town of North Hempstead, HANNAH KOMANOFF, as Supervisor of City of Long Beach, JOSEPH COLBY, as Supervisor of the Town of Oyster Bay, and VINCENT A. SUOZZI, as Mayor-Supervisor of City of Glen Cove,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement of the Case

In *Franklin* v. *Krause,* 32 N.Y.2d 234, 298 N.E.2d 68 (1973), New York's Court of Appeals upheld a modified weighted voting system adopted by the Nassau County Board of Supervisors, that county's legislative body, on the basis of the 1970 decennial census in the face of a constitutional attack grounded upon the very same contentions raised by plaintiffs in this action. This Court dismissed the appeal as of right from that determination for want of a substantial federal question (*Franklin* v. *Krause,* 415 U.S. 904, 39 L.Ed.2d 461, 94 S. Ct. 1397 [1974]).

While the present action ostensibly attacks the local law reapportioning the Board's weighted votes on the basis of the 1980 census, plaintiffs' claims herein were not directed at any new feature of the plan or at the changes made necessary by the slight decline in the county's overall population and by the redistribution of that population among the constituent town and cities revealed in the 1980 census. Rather, plaintiffs herein have claimed only that the newer plan continues to utilize the same weighted voting system and continues to allocate votes on the basis of what they contend is a mathematically erroneous and, therefore, constitutionally defective basis.

In fact, it is not disputed that the current plan based on the 1980 census deviates to a substantially lesser degree from the ideal than did the one, based on the 1970 census, which was held constitutional in *Franklin* v. *Krause, supra.*

Set forth in the opinion of the Court of Appeals for the Second Circuit (737 F.2d 155, 157-158; Appendix A to Petition for a Writ of Certiorari at A-6 to A-7) are the prior plan, the 1970 census counts for the County and

its constituent municipalities, the number of votes allocated to each member of the legislative body and a table computing the resultant deviation between the percentage of population represented by each legislator and the percentage of that legislator's "voting power" (i.e., the percentage of all mathematically possible voting combinations within the legislature in which that legislator's vote would be the decisive one).

Using the very same computations, the New York Court of Appeals in *Franklin* v. *Krause*, 32 N.Y.2d 234, 298 N.E. 2d 68 (1973), held that the 1970 census-based weighted voting plan utilized by the Board did not violate the "one person, one vote" principle.

Most significantly, that Court found that the "range of deviation" under the 1970 census-based plan was 7.3%, which it determined by combining the deviation (3.5%) of the most under-represented municipality (North Hempstead) and that (3.8%) of the most over-represented one (Glen Cove).

Also set forth in the opinion of the Court below (737 F.2d at 159-160; Petitioners' Appendix A at A-10 to A-11) are the current plan, underlying 1980 census data and a similar analysis and computation of the current deviation between percentage of population represented and percentage of voting power for each legislator.

The maximum "range of deviation" under the current plan—measured in exactly the same method as in *Franklin* v. *Krause*—is 5.26%, the combination of Long Beach's legislative overrepresentation (3.19%) and Hempstead's legislative underrepresentation (2.07%). Moreover, as the Court below noted, "[T]hat diminished disparity and the numerical vote allotment are the *only* differences" (737 F.2d 155, 160; Petitioners' Appendix A, A-11; emphasis in original) between the 1970 census-based plan upheld in *Franklin* v. *Krause, supra,* and the 1980 census-based plan attacked in the instant action.

REASONS FOR DENYING THE WRIT

I. The Court below fully considered the issues and correctly determined that the question plaintiffs would present for review is controlled by this Court's summary dismissal of the appeal in *Franklin* v. *Krause*.

Throughout this litigation, plaintiffs' basic contention has been that in *Franklin* v. *Krause*, 32 N.Y.2d 234, 298 N.E.2d 68 (1973), the New York Court of Appeals made a "fundamental mathematical error" in "mixing percentage points and percentages" which "is now being repeated" in the 1980 census-based plan. That alleged error was the failure to divide the "deviation" measured for each Supervisor-legislator by the percentage of County population represented to find what plaintiffs below called the "percentage discrepancy." Had that division been performed, plaintiffs urged, the deviation under the 1970 census-based plan would have been stated as 232%, rather than 7.3%, and under the current plan as 132.16%, rather than 5.26%.

As in their petition to this Court (p. 17), plaintiffs claimed below that this mathematical error was not discovered until after this Court's dismissal of the appeal in *Franklin* v. *Krause*, 415 U.S. 904, 39 L.Ed.2d 461, 94 S.Ct. 1397 (1974). Consequently, they claim, since the method of calculating the 7.3% deviation was not explicitly offered as one of the "Questions Presented" in the Jurisdictional Statement filed by plaintiffs on that appeal, this Court's summary dismissal is not a binding precedent on that issue.

The extensive and clear exposition by the Court below in support of its conclusion that the computation of the 7.3% deviation in *Franklin* v. *Krause* was within the "reach and content" (*Hicks* v. *Miranda*, 422 U.S. 332, 345

n. 14 [1975]) of the summary dismissal in *Franklin* v. *Krause* (see 737 F.2d 155, 168-172; Appendix to Petition, at A-31 to A-39) need not be repeated herein.

It should also be noted, however, that contrary to the assertion repeated in the Petition (p. 17) that the alleged "mathematical error" was not discovered until after this Court's dismissal and that the "proper" method of measuring was not raised in the *Franklin* v. *Krause* litigation, the very same percentages which plaintiffs derive from their method of computation were presented to the courts throughout the *Franklin* v. *Krause* suit. The lower court decision therein, reversed by the New York Court of Appeals, utilized the very method plaintiffs herein claim was erroneously overlooked by the Court of Appeals and expressly relied on the percentages thus computed to find the prior plan unconstitutional (72 Misc.2d 104, 107, 338 N.Y.S.2d 561, 565 [1972]). Moreover, the plaintiffs in *Franklin* v. *Krause* argued in their brief to the Court of Appeals on the basis of the same method of calculation and percentages urged by plaintiffs herein. (See appendix hereto, excerpt of Plaintiffs-Respondents' Brief to Court of Appeals in *Franklin* v. *Krause,* particularly the footnote on p. 2 thereof).

In truth, then, the numbers argument is nothing new and this action was and is merely the latest effort to reargue and relitigate issues raised in *Franklin* v. *Krause,* an effort also made and rejected on stare decisis grounds in the state courts (*Bechtel* v. *Board of Supervisors,* 54 N.Y.2d 674, 425 N.E.2d 897 [1981]).

Plaintiffs' attempt to limit the preclusive effect in this action of the summary dismissal in *Franklin* v. *Krause* to the specific challenges presented in the Jurisdictional Statement therein also misses the mark by ignoring the basic principle that a summary dismissal for want of a substantial federal question, whatever the limitations on

its precedential value in other cases, is an affirmance on the merits of the state court judgment.

The state court judgment in *Franklin* v. *Krause* necessarily rested upon the finding that the deviation between Board members' voting power and the percentages of population represented was not substantial enough to violate the Equal Protection Clause. That issue was at the heart of the state court litigation.

The instant case involves the same local legislature using the same weighted voting system. The only difference is that the deviation is significantly less, however mathematically measured and stated, than it was under the prior constitutional plan. Most significantly, the plaintiffs profess to represent the same aggrieved interest as did the plaintiffs in the prior action and mount the same claim of invalidity. Any judgment herein upholding plaintiffs' contention in this respect would necessarily contradict the state court judgment of constitutionally affirmed by this Court in *Franklin* v. *Krause*. Any such judgment is, therefore, clearly barred by that affirmance.

Thus, the cases relied on by plaintiffs in which this Court found itself not bound by a prior summary affirmance in subsequent actions initiated by parties claiming different interests and voicing distinct constitutional challenges to the same statute (*Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 59 L.Ed. 2d 230, 99 S. Ct. 983 [1979]), or challenging different features of similar statutes in different states (*Mandel* v. *Bradley*, 432 U.S. 173, 53 L.Ed.2d 199, 97 S. Ct. 2238 [1977]; *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 69 L.Ed2d 800, 101 S. Ct. 2882 [1981]) are not in point. This is not, in reality, a case *like Franklin* v. *Krause*. This is, in reality, the *same* case and the result herein should not be different merely because the names of the plaintiffs have changed.

II. There is no conflict between the decision of the Court below and this Court's summary affirmance in *Franklin* v. *Krause*, on the one hand, and other reapportionment decisions of this Court on the other.

This Court has consistently recognized and frequently stated that, with respect to local legislative bodies, the Equal Protection Clause permits much greater flexibility and much more substantial departures from absolute numerical equality of representation than is the case with a state and, even more so, the national legislature. Compare, for example, *Brown* v. *Thomson,* U.S. , 77 L.Ed.2d 214, 103 S. Ct. 2690 (1983), holding constitutional a state legislature apportionment plan with a maximum deviation of 89% and *Karcher* v. *Daggett,* U.S. , 77 L.Ed.2d 133, 103 S. Ct. 2653 (1983), holding unconstitutional a reapportionment plan for congressional districts with a maximum deviation of less than 1%. In *Karcher,* the Court expressly noted that "[W]e have required that absolute population equality be the paramount objective of apportionment only in the case of congressional districts for which the command of Art. I, § 2 * * * outweighs the local interests that a State may deem relevant in apportioning districts for * * * state and local legislatures" (77 L.Ed.2d at 142, 103 S. Ct. at 2659).

Contrary to plaintiffs' repeated assertions, none of the legion of Supreme Court cases dealing with State and local reapportionment disputes has ever announced a prescribed mathematical formula for testing compliance of State and local legislatures with the mandate of Equal Protection. Rather, the Court has always recognized that there is no mathematical formula embodied in the Equal Protection Clause and that other policies and factors, such as the desire to maintain the integrity of political subdivisions, the obvious and established motivation for the use

of weighted voting in Nassau County (see *Franklin* v. *Krause,* 32 N.Y.2d 234, 238-239, 298 N.E.2d 68, 70) are legitimate and constitutional considerations. See e.g., *Abate* v. *Mundt,* 403 U.S. 182, 185-187, 29 L.Ed.2d 399, 402-403, 91 S. Ct. 1904, 1906-1907 (1971); *Mahan* v. *Howell,* 410 U.S. 315, 329, 35 L.Ed.2d 320, 333, 93 S. Ct. 979, 987 (1973); *Gaffney* v. *Cummings,* 412 U.S. 735, 748-749, 37 L.Ed.2d 298, 309-310, 93 S. Ct. 2321, 2329-2330 (1973).

It is relevant to note that plaintiffs in their Petition to this Court have abandoned the contention made below (see 737 F.2d at 167; Petitioners' Appendix A, at A-27 to A-28) that the use of weighted voting by the defendant Board is *per se* unconstitutional. Thus, they have, at least implicitly, acknowledged that that issue, which was the first of the "Questions Presented" in the Jurisdictional Statement filed with this Court in *Franklin* v. *Krause,* is foreclosed by the summary dismissal of that appeal.

Yet, in reality, their attempt to argue mathematical formulae is only an indirect attack upon the use of weighted voting itself. (Note, in this connection, the final paragraph of Point I in the Petition, p. 15).

The use of weighted voting by Nassau County's legislative body being clearly and, apparently, concededly constitutional and the County's population being distributed among its towns and cities as it is, allocation of the weighted votes on the basis of a computer analysis of "voting power" rather than by giving each Supervisor a fraction of the votes corresponding to his municipality's proportion of County population is the only meaningful method for apportioning the Board's votes. If the latter method were used, the two Hempstead Supervisors would be the county legislature and residents of the other munci-

palities would be effectively and completely disenfranchised. See *Iannucci* v. *Board of Supervisors,* 20 N.Y.2d 244, 252, 229 N.E.2d 195, 199 (1967).

Using the "voting power" method gives each Supervisor legislative power that substantially corresponds to the number of residents he represents. With all the charts, percentage calculations, mathematical equations, and self-created terms (*e.g.,* "Absolute Difference" and "percentage deviations"; Petition, pp. 7-8) plaintiffs have presented, they have never disputed—and they cannot dispute—that the present apportionment of weighted votes among Board members distributes its "voting power" *as close as is mathematically possible* to the percentage of population each Supervisor represents.

Parenthetically, it is observed that the Petition (pp. 8-11 and "Table I") attempts a bootstrap argument based on self-serving and unsubstantiated observations comparing the reports of computer experts, including the one employed by Nassau County, to other New York county legislative bodies. The primary case cited by plaintiffs in this connection is *English* v. *Lefever,* 94 A.D.2d 755, 462 N.Y.S.2d 695 (1983), in which the Petition (p. 9) claims that the Appellate Division invalidated the reapportionment plan of Rockland County "because the plan had a deviation of 37.15% [but that] This plan would not have been struck down had the Court used the measure used by the New York courts in *Franklin* v. *Krause* and in the court below."

However, the Court's memorandum decision in that case clearly puts its holding on different grounds and most pointedly notes that "[U]nlike the proponents of the Nassau County plan in *Franklin* v. *Krause* [citations omitted] the defendants here have failed to establish that their plan has no practical alternatives. *Absent such*

proof, the 37.15% discrepancy was properly held to be grossly excessive." (94 A.D.2d at 756, 462 N.Y.S.2d at 696; emphasis added).

In any event, as noted above, the plan involved herein is the closest mathematical equality possible while preserving the integrity of Nassau County's political subdivisions and their historic role in county goverment. This Court's many reapportionment decisions, including but not limited to *Franklin* v. *Krause,* make it clear that more is not required, and the decision of the Court below fully accords with those decisions.

III. The issue raised by the Petition does not warrant certiorari review by this Court.

It is certainly at least as true and as significant today as it was when stated by then Chief Judge Taft in 1923 that certiorari jurisdiction is not designed "merely to give the defeated party in the Circuit Court of Appeals another hearing" (*Magnum City* v. *Coty,* 262 U.S. 159, 163).

It is respectfully submitted that consideration of the Petition itself and the foregoing discussion demonstrate that no meritorious reason for granting certiorari is presented herein. There is no showing of a conflict in decisions between the Circuit Courts of Appeal or between the decision of the Court of Appeals herein and any decisions of this Court. There has been no departure from the accepted and usual course of judicial proceedings. There is not presented a novel, important question which is likely to recur and which has not been, but should be, settled by this Court. (See, generally, Rule 17 of the Rules of this Court).

What is presented, again, is the apportionment of weighted votes in a single county legislature (Petition,

p.8), by a method in use in that County for several years during which it has been repeatedly sanctioned by the courts, including this Court.

The Court has obviously had several, recent occasions to speak with respect to the requirements of Equal Protection in state and local reapportionment cases and nothing in the instant case suggests the need for, or this case's worthiness as a vehicle for, further pronouncements or clarification on that subject.

In short, the applicable law is well settled and, in its opinion unanimously affirming the District Court's grant of summary judgment to defendants, the Court of Appeals thoroughly considered all of plaintiffs' contentions and correctly applied the well settled law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Excerpt from Plaintiffs-Respondents' Brief to New York Court of Appeals in *Franklin* v. *Krause*

The following table demonstrates the fatal defects in the distribution of "voting power" in the "new" plan, based upon the 1970 federal census figures set forth in Appendix A to this brief.:

Supervisor	% of 1970 Population	% of Voting Power
Presiding Supervisor, Hempstead	28.135	27.777
Supervisor, Hempstead	28.135	27.777
(Hempstead total)	(56.271)	(55.555)
Supervisor, Oyster Bay	23.131	20.370
Supervisor, North Hempstead	16.458	12.963
Supervisor, Long Beach	3.328	5.555
Supervisor, Glen Cove	1.811	5.555

Even a cursory observation of these figures demonstrates that the City of Glen Cove (5.555% of the voting power) is given a quantum of voting power more than three times greater than its share of the population (1.811%) while each of the three towns is given voting power less than its proportionate share of the population. Further, the City of Long Beach, with a population more than 33% greater than that of the City of Glen Cove, is allocated precisely the same percentage of voting power. Similarly, the Town of North Hempstead, which is entitled by population to 16.458% of the decisive vote, is deprived of 21.2% of the power to which it is entitled, and the Town of Oyster Bay is deprived of 11.9% of the

Excerpt from Plaintiffs-Respondents' Brief to New York Court of Appeals in Franklin v. Krause

23.131% of decisive votes to which it is constitutionally entitled.*

Whether or not this resulting disparity is intended to improve the legislative lot of the two smallest represented municipalities, as contended by appellants, is not determinative of the constitutional issues involved. As the majority may not transcend the constitutional rights of the minority to equal protection of the laws, neither may the minority be given overprotection at the expense of the remaining populace. The argument urged by appellants to sustain the imbalance inherent in their "new" system should not be permitted to validate a plan of inequality. Neither should the plan be sustained on the appellants' explanation that it preserves political representation from the two.

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* With respect to North Hempstead, 21.2% is arrived at by subtracting 12.963% from 16.458% to which it is entitled. This yields a difference of 3.495% which, when divided by 16.453 results in a 21.2% loss of power entitlement to that town. By a similar process, it is determined that the Town of Oyster Bay is deprived of 23.131% of the voting power to which it is entitled.